procedures under 1129(b) if the Court determines that the plan is fair and equitable and does not discriminate unfairly against the rejecting classes.

Let's first turn to the fair and equitable requirement. A plan is fair and equitable if it follows the absolute priority rule, meaning that if a class does not receive payment in full, no junior class will receive anything under the plan. With respect to Class 8, no junior class -- junior class to Class 8 will receive payment, and here is the key point, unless Class 8 is paid in full, with appropriate interest. NPA and Dugaboy -- Dugaboy in a brief filed on Monday -- argue that the plan does not satisfy the absolute priority rule because Class 10 and Class Equity Interests have a contingent right to receive property under the plan.

Your Honor, this argument misunderstands the absolute priority rule. Class 10 and Class Creditors will only receive payment after distribution to 8 and 9, the unsecured claims and the subordinated claims, are all paid in full, plus interest.

And, in fact, Dugaboy, in its brief, to its credit, admits that the argument is contrary to the Bankruptcy Court's decision of Judge Gargotta in the Western District case of *In re Introgen Therapeutics*. There, the Court was faced with a similar argument by a group of unsecured creditors who argued that the debtor's plan violated the absolute priority rule

because equity was retaining a contingent interest that would only be payable if general unsecured claims were paid in full.

In rejecting the argument, the Court reasoned, and I quote, "The only way Class 4 will receive anything is if Class 3, in fact, gets paid in full, in satisfaction of 1129(b)(2)(B)(i)," meaning that the absolute priority rule would not be an issue. If Class 3 is not paid in full, Class 4's property interest is not -- is just -- is not just valueless, it just doesn't exist.

Your Honor, this is precisely the situation in this case. Equity interests will only receive a recovery if Class 8 and 9 are paid in full.

But Dugaboy attempts to escape the logical reading of the absolute priority rule by claiming that *Introgen* was wrongly decided and goes against the Supreme Court's decision in *Ellers* (phonetic). Dugaboy argues that because the Supreme Court decided that property given to a junior class without paying a senior class in full is property, even if it's worthless.

But Dugaboy misses the point. Like the debtor in the *Introgen*, the Debtor here is not arguing that the property -- the absolute priority rule is not violated because the contingent trust is worthless. Rather, the argument is that the absolute priority rule is not violated; it's, in order to receive anything on account of the junior -- of the equity,

the senior creditors have to be paid a hundred percent plus interest.

In fact, Your Honor, if the plan just didn't give any recovery to the equity Class 10 and 11, I bet you Dugaboy and Mr. Dondero would be arguing that it violated the absolute priority rule because senior classes, unsecured creditors, could potentially receive more than a hundred percent of their interest. And there's a case in the Southern District of Texas, *In re MCorp*, where the Bankruptcy Court said that for a plan to be confirmed, its stockholders eliminated, creditors must not receive more than payment in full.

Excess proceeds, Your Honor, if any, have to go somewhere. They can't go to creditors, so they have to go to equity. And the absolute priority rule is not violated.

And how is Dugaboy harmed? They say they may want to buy the contingent interests, and the lack of a marketing effort violates the *LaSalle* opinion as well. And who holds the Class B and Class C partnership interests that come before Dugaboy that Dugaboy is concerned may have this opportunity rather than them? Yes, it's Hunter Mountain, Your Honor, an entity, like Dugaboy, that's owned and controlled by Mr. Dondero.

Accordingly, the argument that the plan violates the absolute priority rule is actually a frivolous argument.

Turning now to unfair discrimination, Your Honor, Dugaboy argued in its brief Monday that because the projected

distribution to unsecured creditors has gone down in the recent plan projections, the discrepancy between Class 7 and Class 8 is so large that that amounts to unfair discrimination.

Again, the Court should first ask why is Dugaboy even the right party to be making the objection. Its claim against the Debtor to pierce the corporate veil, as I mentioned, is frivolous. It's subject to objection. It didn't even bother to have the claim temporarily allowed for voting purposes, as did other creditors who thought they had a valid claim. Yet this is another example of Mr. Dondero, through Dugaboy, trying to throw as many roadblocks in front of confirmation as he can.

But this argument, like the other ones, fails as well. Class 8 contains the general unsecured creditor claims, predominately litigation claims that have been pending against the Debtor for years. The Debtor was justified in treating the other unsecured creditors differently.

Class 6 consists of the PTO claims in excess of the cap, which are of different quality and nature than the other claims.

Class 7 consists of the convenience class. And it's appropriate to bribe convenience class creditors with a discount option for smaller claims to be cashed out for administrative convenience.

Mr. Seery testified that when the plan was formulated, the concept was to separately classify liquidated claims in small amounts in Class 7 and unliquidated claims in Class 8. Mr. Seery also testified that there's a valid business justification to treat the -- hold business 7 -- Class 7 claims differently. These creditors had a reasonable expectation of getting paid promptly, as compared to litigation creditors, who would expect to be paid over time.

As the Court is aware, the litigation claims in Class 8 involve litigation that has been pending for several years in the case of Acis, Daugherty, Redeemer, and more than a decade in UBS.

And most importantly, as Mr. Seery testified, the Committee and the Debtor had significant negotiation regarding the classification and treatment provisions of the plan for Class 7.

The Committee does have one constituent who is a Class 7 creditor. However, the other three creditors are all in Class 8 and hold claims in excess of $200 million and supported the separate classification and the different treatment.

So, Your Honor, discrimination, different treatment among Class 7 and 8 is appropriate, and the different treatment is not unfair. In the February 1 projections, the Class 8 creditors are estimated to receive 71.32 percent of their claims, but that's just an estimate. As Mr. Seery testified,

the number can go up based upon the value he can generate from the assets and, importantly, from litigation claims. Class 8 creditors could up end up receiving a hundred percent on account of their claims. Class 7 creditors are fixed at 85 percent.

Giving Class 8 creditors the opportunity to roll the dice and potentially get more or less than the 85 percent offered to Class 7 is not at all unfair.

For these reasons, Your Honor, the Court has the ability and should confirm the plan pursuant to the cram-down provisions of 1129(b).

Your Honor, I'm now going to switch from the statutory requirements to all the issues raised by the release, injunction, and exculpation provisions.

I'd just like to take a brief sip of water.

Dugaboy -- I will first deal with the Debtor release provided in Article 9(f) of the plan, which we claim is appropriate. Dugaboy and the U.S. Trustee have objected to the release contained in Article 9(f). Dugaboy objects because it believes that the Debtor release releases claims that the Claimant Trust or Litigation Trust have that have not yet arisen, and the U.S. Trustee objects because it believes that the release is a third-party release.

These objections have no merit, and they should be overruled.

I would like to ask Ms. Canty to put up a demonstrative which contains the provision Article 9(f) of the plan.

Your Honor, as set forth in this Article 9(f), only the Debtor is granting any release. While that --

THE COURT: And for the record, it's 9(d)? 9(d), right?

MR. POMERANTZ: 9(d)? 9(d), correct, Your Honor.

THE COURT: Yes. Okay.

MR. POMERANTZ: Sorry about that.

THE COURT: Uh-huh.

MR. POMERANTZ: While the release is broad, it does not purport to release the claims of any third party. The Claimant Trust and the Litigation Trust are only included in the release as successors of the Debtor. The release is specifically only for claims that the Debtor or the estate would have been legally entitled to assert in their own right.

Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may provide for the settlement or adjustment of any claims or interests belonging to the debtor or the estate, and that's exactly what the Debtor release provides.

Accordingly, Dugaboy is wrong that the release effects a release of claims that the Claimant Trust or the Litigation Sub-Trust have that won't arise until after the effective date. And the U.S. Trustee is simply wrong; there's no third-party release aspect under the release.

The last point I will address on the release, Your Honor, is who is being released and why and what does the evidence show. The Debtor release extends to release parties which include the independent directors, Strand, for actions after January 9th, Jim Seery as the CEO and CRO, the Committee, members of the Committee, professionals, and employees.

You have heard Mr. Seery's testimony that the Debtor does not believe that any claims against the parties that are proposed to be released actually exist. You have heard Mr. Seery's testimony that he worked closely with the employees and believes that not only have they all been instrumental in getting the Debtor to the -- be on the cusp of plan confirmation, but that also Mr. Seery is not aware of any claims against them.

Moreover, as Mr. Seery testified, the release for the employees is only conditional. He testified that the employees are required to assist in the monetization of assets and the resolution of claims, and if they do not like -- if they do not lose their release, then any Debtor claims are tolled, such that could be pursued by the Litigation Trustee at a future time.

Lastly, I'm sure that the Dondero entities will argue that someone needs to investigate claims against Mr. Seery for mismanagement or for, God forbid, having failed to file the 2015.3 statements. Such claims are part of the continuing

harassment of Mr. Seery that the Dondero entities have embarked on after it was apparent that nobody would support their plan.

There is no evidence of any claims that exist, Your Honor. In fact, the Committee and its professionals have watched the Debtor through this case like a hawk. They have not been afraid to challenge the Debtor's actions in general and Mr. Seery's in particular. FTI has worked on a daily basis with DSI and the company, had access to information. When COVID was happening, they were looking at trades going on on a daily basis.

So if the Committee, whose members hold approximately $200 million of claims against the estate, are okay with the release against the independent directors and Mr. Seery, that should provide the Court with comfort to approve the releases as part of the plan.

In summary, Your Honor, the Debtor release is entirely appropriate and does not affect the release of third-party claims that have not yet arisen.

Next, Your Honor, I want to go to the discharge. There's been objections to the discharge. Dugaboy and NexPoint have objected that the Debtor receiving a discharge under the plan -- argue a debtor is liquidating. The objection is not well taken based upon Mr. Seery's testimony regarding what it is the Claimant Trust and the Reorganized Debtor plan to do after

the effective date, as compared to what the limitations of a discharge are under 1141(d)(3).

Your Honor, Article 9 of the -- 9(b) of the plan provides that as -- except as otherwise expressly provided in the plan or the confirmation order, upon the effective date, the Debtor and its estate will be discharged or released under and to the fullest extent provided under 1141(d)(A) [sic] and other applicable provisions of the Bankruptcy Court. Bankruptcy Code.

Section 1141(d)(3) provides an exception to the discharge, and I'd like to have that section put up for Your Honor at this point. Ms. Canty?

As this -- as the section reflects, and as the Fifth Circuit has ruled in the *TH-New Orleans Limited Partnership* case cited in our materials, in order to deny the debtor a discharge under 1141(d)(3), three things must be true: (1) the plan provides for the liquidation of all or substantially all of the property in the estate; (2) the debtor does not engage in business after consummation of the plan; and (3) the debtor would be denied a discharge under 727(a) of this title if the case was converted to Chapter 7. Here, only C applies.

With respect to A, Your Honor, while the plan does project that it will take approximately two years to monetize the Debtor's assets for fair value, the Debtor is just not liquidating within the meaning of Section A.

As Mr. Seery testified, during the post-confirmation period, post-effective date period, the Debtor will continue to manage its funds and conduct the same type of business it conducted prior to the effective date. It'll manage the CLOs. It'll manage Multi-Strat. It'll manage Restoration Capital. It'll manage the Select Fund, and it'll manage the Korea Fund.

The Bankruptcy Court for the Southern District of New York's 2000 opinion in *Enron*, cited in our materials, is on point. There, the Court found that a debtor liquidating its assets over an indefinite period of time that is likely to take years is not liquidating within the meaning of Section 1141(b)(3)(A), justifying a denial of discharge.

But even if we failed A, based upon Mr. Seery's testimony, we would not fail B. The Debtor will be continuing to do what it has done during the case, as it did before, as I said, managing its business. B says the debtor does not engage in the business after management. So while Mr. Seery testified that it would take approximately two years, it could take more, it could take less, and there is no requirement to liquidate assets over a period of time.

Accordingly, Your Honor, the Debtor is conducting the type of business contemplated by Section B so as not to just deny a discharge.

As the Fifth Circuit said in the *TH-New Orleans* case, the court granted a discharge there because it was likely that the

debtor would be liquidating its assets and conducting business (indecipherable) years following a confirmation date. And this result makes sense, Your Honor, because the Debtor will need the discharge and the tenant injunctions, which I'll get to in a moment, in order to prevent interference with the Debtor's ability to implement the terms of the plan and make distributions to creditors.

I would now like, Your Honor, to turn to the exculpation provisions, which there's been -- there's been a lot of briefing on it, and I know Your Honor is very aware of the exculpation provisions and the *Pacific Lumber* case. And several parties have objected to the exculpation contained in the plan, based primarily on the Fifth Circuit ruling in *Pacific Lumber*.

The exculpation provision, which is not dissimilar to what is found in many plans around the country, including in plans confirmed in bankruptcy courts in the Fifth Circuit, acts to exculpate the exculpated parties for negligent-only acts as it contains the standard carve-outs for gross negligence, intentional conduct, and willful misconduct.

I do want to bring to the Court's attention a deletion we made to the parties protected by the exculpation in the plan and now -- were filed on February 1st. The definition of exculpated parties included, before February 1, not only the Debtor but its direct and indirect majority-owned subsidiaries

and the managed funds. In the plan amendment, we have deleted the Debtor's direct and indirect majority-owned subsidiaries and managed funds from the definition and are not seeking exculpation for those entities.

But before, Your Honor, I address *Pacific Lumber* and why the Debtor believes it does not preclude the Court from approving the exculpation in this case, I do want to focus on something that the Objectors conveniently ignore from their argument.

As I mentioned in my opening argument, Your Honor, the independent directors were appointed pursuant to the Court's order on January 9, 2020. They have resolved many issues between the Debtor and the Committee, and avoided the appointment of a Chapter 11 trustee.

The January 9th order was specifically approved by Mr. Dondero, who was in control of the Debtor at the time, and I believe the transcripts that are admitted into evidence will demonstrate that he was fully behind the approval of the January 9th order.

In addition to appointing the independent directors into what was sure to be a contentiously litigious case, the January 9th order set the standard of care for the independent directors, and specifically exculpated them from negligence.

You have heard Mr. Seery and Mr. Dubel testify that they had input into what the order said and would have not agreed

to be appointed as independent directors if it did not include Paragraph 10, as well as the provisions regarding indemnification and D&O insurance.

I would like to put a demonstrative on the screen, which is actually Paragraph 10 of that order. Your Honor, Paragraph 10, there's two concepts embedded here. First, it requires any parties wishing to sue the independent directors or their agents to first seek such approval from the Bankruptcy Court. Secondly, and importantly for purposes of the independent directors and their agents, who would include the employees, it set the standard of care for them during the Chapter 11 and entitled them to exculpation for negligence. Paragraph 10 says the Court will only permit a suit to go forward if such claim represents a colorable claim for willful misconduct or gross negligence.

And Your Honor, Paragraph 10 does not expire by its terms.

By not including negligence in the definition of what a colorable claim might be, the Court has already exculpated the independent directors and their agents, which include the employees acting at their direction.

And because the independent directors and their agents are exculpated under Paragraph 10, Strand needs to be exculpated as well for actions occurring after January 9th. This is because a suit against Strand for conduct after the independent board was appointed is effectively a suit against

the independent directors, who were the only people in control of Strand at that time.

After the effective date, Mr. Dondero will regain control of Strand, as the independent directors will be discharged. And for parties able to sue Strand essentially for negligence for conduct conducted by the independent directors after January 9th, Strand will then be able to seek indemnification from the Debtor under the Debtor's partnership agreement because the partnership agreement does provide the general partner is entitled to indemnification.

Accordingly, an exculpation for Strand is really the functional equivalent of an exculpation for the independent directors and the Debtor.

The January 9th order was not appealed, and an objection to exculpation at this point as it relates to the independent directors, their agents, and Strand is a collateral attack on this order. So, Your Honor, Your Honor does not even need to get to the thorny issues addressed by *Pacific Lumber*.

However, even in the absence of the January 9th order, exculpation of the independent directors and their employees, as well as the other exculpated parties, is not prohibited by *Pacific Lumber*. In *Pacific Lumber*, the Fifth Circuit reversed a bankruptcy court order confirming a plan because the exculpation provision was too broad and included parties that the Fifth Circuit thought could not be exculpated under

Section 524(e) of the Code.

A close look at the issue before the Court, Your Honor, the reasoning for the Court's ruling and why certain parties like Committee and its members were entitled to exculpation, reflects that this case does not prevent the Court from approving exculpation of this case.

A careful read of the underlying briefs and opinions in *Pacific Lumber* reveals that the concern that the Appellants had in that case was the application of exculpation to non-fiduciary sponsors. There were two competing plans in the case. The first was filed by the indenture trustee. The second was filed by the debtor's parent and lender, and was deemed -- called the Marathon Plan. The Court confirmed the Marathon Plan, and the indenture trustee appealed, and the indenture trustee argued that the plan sponsors could not be exculpated.

After determining that the appeal of the exculpation provisions were not equitably moot, the Fifth Circuit determined that exculpation was not authorized under 524(e) of the Code because that section provides a discharge of the debtor does not affect the liability of any other entity on such debt.

However, and here's the important part, Your Honor: The Fifth Circuit did not say that all exculpations are prohibited under the Code and authorized the exculpation of the Committee

and its members. And why did the Court do that? Because it looked at the Committee's qualified immunity under 1103 and also reasoned that Committee members are essentially disinterested volunteers that should be entitled to exculpation on negligence.

The Court also cited approvingly *Colliers* for the proposition that if Committee members were not exculpated for negligence and subject to suit by people who are unhappy with them, they just would not serve.

Accordingly, the Fifth Circuit based its willingness to exculpate Committee members on the strong public policy that supports exculpation for those parties under those circumstances. And against this backdrop, Your Honor, there are several reasons why the Court should authorize exculpation in this case, notwithstanding *Pacific Lumber*.

First, Your Honor, the independent directors in this case are analogous -- much more analogous to the Committee members that the Fifth Circuit ruled were entitled to than the incumbent officer and directors.

Your Honor has the following facts before the Court, based upon the testimony of Mr. Seery and Mr. Dubel and other evidence in the record. The independent board members were not part of the Highland enterprise before the Court appointed them on January 9th. The Court appointed the independent directors in lieu of a Chapter 11 trustee to address what the

Court perceived as the serious conflicts of interest and fiduciary duty concerns with current management, as identified by the Committee.

The independent directors would not have agreed to accept their role without indemnification, insurance, exculpation, and the gatekeeper function provided by the January 9th order.

And Mr. Dubel testified regarding the significant experience he has as an independent director during his 30-plus years in the restructuring community, including several engagements as an independent director in Chapter 11 cases. And he testified that independent directors have become commonplace in complex restructurings over the last several years and have been appointed in many cases, including high-profile cases. We've cited to just a few of those cases in our brief, but we could go on and on.

Mr. Dubel testified that the independent directors are a critical tool in proper corporate governance and restoring creditor confidence in management in modern-day restructurings, and he testified that, based upon his experience, independent directors expect to be indemnified by the company, expect to obtain directors and officers insurance, and expect to be exculpated from claims of negligence when they agree to be appointed.

He further testified that if independent directors cannot be assured that they will be exculpated for simple negligence,

he believes they will be unwilling to serve in contentious cases like the one we have here, which will have a material adverse effect on the Chapter 11 restructuring process as we know it.

Based upon the foregoing testimony, Your Honor, which is uncontroverted, the Court should have no problem finding that the independent directors are much more analogous to the Committee members in *Pacific Lumber* who the Fifth Circuit said could be exculpated.

The facts, these facts also distinguish this case from the *Dropbox v. Thru* case which Your Honor decided and which was reversed on this issue by the District Court. In neither *Pacific Lumber* or *Thru* was there an argument that the policy reasons that supported exculpation of Committee members also supported the exculpation of the parties sought to be exculpated.

Moreover, Your Honor, the independent directors in this case were pointed as essentially as substitute for a Chapter 11 trustee. There was a Chapter 11 trustee motion filed a few days before, I believe, and the Court, in approving this, said that you -- better than a Chapter 11 trustee. And Chapter 11 Trustees are entitled to qualified immunity. So, while, yes, the independent directors aren't truly Chapter 11 trustees, they are analogous.

Second, Your Honor, while there is language in *Pacific*

Lumber that says that the directors and officers of the debtor are not entitled to exculpation, the issue before the Court really on appeal was the plan sponsors and whether they were. So I would argue that any discussion of the exculpation not being available for directors and officers in the Fifth Circuit opinion in *Palco* is actually dicta.

Third, Your Honor, as I discussed before, the *Pacific Lumber* decision was based solely on 524(e) of the Bankruptcy Code, which only says that the discharge of a claim against the debtor does not affect the discharge of a third party. However, the Debtor is not relying on 524(e) as the basis of their exculpation. As we outline in our brief, Your Honor, we believe that the exculpation is appropriate under Section 105 and 1123(b)(6) as a means -- part of an implementation of the plan.

Importantly, Your Honor, as other courts hostile to third-party releases have determined, exculpation only sets a standard of care for parties and is not an effort to relieve fiduciaries of liability.

Other courts that have aligned with the Fifth Circuit and rejected third-party releases, like the Ninth Circuit, have recently determined exculpation has nothing to do with 524(e). In *In re Blixseth*, a Ninth Circuit case decided at the end of 2020 cited in our materials, they examined several of their circuit cases that had strongly prohibited non-consensual

third-party releases under 524(e). But again, the Court concluded that 524(e) only prohibits third parties from being released from liability of a prepetition claim for which the debtor receives a discharge. The Court reasoned that the exculpation clause, however, protects parties from negligence claims relating to matters that occurred during the Chapter 11 case and has nothing to do with 524(e).

The Ninth Circuit, which along with the Fifth Circuit has been notorious for prohibiting third-party releases, issued its ruling against this backdrop and said that exculpations are appropriate.

Your Honor, the Objectors made a point yesterday of pointing out that Strand, as the Debtor's general partner, is liable for the debts under applicable law. To the extent they intend to argue that the exculpation is seeking to discharge any such prepetition liability, they would be wrong. The exculpation only applies to postpetition matters. And to the extent they argue that the exculpation seeks to discharge Strand's potential postpetition liability, for the reasons I discussed, a claim against Strand will essentially be a claim against the Debtor because the Debtor will be obligated to indemnify them.

Accordingly, Your Honor, we submit that if this matter goes up to appeal to the Fifth Circuit, which it may very well do, that the Fifth Circuit may very well come out the same way

as the Ninth Circuit and start relaxing the standard or otherwise provide that the independent directors are much more like Committee members.

Lastly, Your Honor, if the Court does confirm the plan, which we certainly hope it will do, it will have made a finding that the plan has been proposed in good faith, and in doing so, the Court essentially finds that the independent directors and their agents have acted appropriately and consistent with their fiduciary duties, and it makes -- exculpation for negligence naturally flows from that finding.

Your Honor, I would now like to go to the injunction provisions, and my argument is that the injunction provisions as amended are appropriate.

THE COURT: Can I stop you?

MR. POMERANTZ: We received several of -- yes.

THE COURT: I want to just recap a couple of things I think I heard you say. You're not asking this Court, you say, to go contrary to *Pacific Lumber* per se. You have thrown out there the possibility that *Pacific Lumber* mistakenly relied on 524(e) in rejecting exculpations of plan sponsors. You're saying, eh, as a technical matter, I think they were wrong in focusing on that statute because that statute seems to deal with prepetition liability. Okay? Its actual wording, 524(e) states, discharge of a debt of a debtor does not affect the liability of any other entity on such debts.

And reading between the lines, I think you're saying -- well, maybe this isn't what you're saying, but here's what I inferred -- "debt" is defined in 101(12) to mean liability on a claim, and then "claim" is defined in 101(5) of the Bankruptcy Code as meaning right to payment. It doesn't say as of the petition date, but I think if you look at, then, Section 502 of the Bankruptcy Code that addresses claims and interests, clearly, it seems to be referring to the prepetition time period, you know, claims and interest as of the petition date. And then -- that's 502. And then 503 speaks of, for the most part, postpetition administrative expenses.

So that was my rambling way of saying I'm understanding you to say, eh, as a technical matter, we think the Fifth Circuit was wrong to focus on 524(e) because when you're talking about exculpation you're talking about postpetition liability, not prepetition liability. And 524(e) is talking more about prepetition liability.

But I think what I also hear you saying is, at bottom, *Pacific Lumber* was sort of a policy-driven holding where, you know, we're worried about no one would ever sign up for being on an unsecured creditors' committee if they could be exposed to lawsuits. They're fiduciaries, we think, for policy reasons. Exculpation is appropriate for this one group. And you're saying, well, they didn't have an independent board

that they were considering. They were just considering non-fiduciary plan sponsors. And so the rationale presented by *Pacific Lumber* applies equally here, and just they didn't make a holding in this factual context.

Have I recapped what you're saying?

MR. POMERANTZ: Your Honor, that's generally -- generally correct, with a couple of nuances. So, yes, first, I think, on a policy basis, Your Honor -- again, putting aside the January 9th order, because we don't see --

THE COURT: Right. Right.

MR. POMERANTZ: -- Your Honor even needs to get to this issue.

THE COURT: I understand.

MR. POMERANTZ: But if Your Honor does get to this issue, we think, as a first point, Your Honor could be totally consistent with *Pacific Lumber* because there's policy reasons and there was not a categorical rejection of exculpation. Okay. So if there was a categorical rejection, then it wouldn't have been okay for committee members. Okay.

Second argument, yes, we don't think -- we think it's part of dicta. It's not part of the holding. We understand that other courts may have not agreed, maybe your *Thru* case, which Your Honor was appealed on.

But the third issue, our argument is all they looked at was 524(e). They said 523 -- 4(e) does not authorize it.

They did not say 524(e) prohibits it.

We think there's other provisions in the Code. And then when you basically add in the analysis that Your Honor provided, which we agree with, and what 524 was -- to do, 524(e) just says that discharge doesn't affect. It doesn't say that under another provision of the Code or for another reason you are authorized to give an exculpation. I think it's a nuance and it's a difference there.

And my point of bringing up the *Blixseth* case -- which, of course, is Ninth Circuit and it's not binding on Your Honor, it's not binding on the Fifth Circuit -- is to say, when that was presented to them, they saw the distinction that 524(e) has nothing to do with an exculpation. And while, yes, the Fifth Circuit hasn't ruled on that, and if the Fifth -- if that argument is made to the Fifth Circuit, we don't know how they would rule, I think that, based upon their analysis -- which, again, Your Honor, is no more than a page and a half of their opinion, right, of a long, lengthy opinion on the confirmation issues. So I think, Your Honor, with the Fifth Circuit, there is a good chance that based upon the developing case law of exculpation, based upon the sister circuit in *Blixseth* making that distinction, that there is a very good chance that the Fifth Circuit would change.

But look, I recognize that argument requires Your Honor to say, okay, this is outside and -- and what *Pacific Lumber* did

or didn't do. But I think, Your Honor, there's several potential reasons, there's several potential arguments that you can get to the same place.

THE COURT: Okay. Thank you.

MR. POMERANTZ: Okay. If I may just get another glass of -- sip of water before my time starts?

THE COURT: Okay.

MR. POMERANTZ: Okay, Your Honor. We're now turning to the injunction provision. The Debtor received several objections to the injunction provisions in -- I think I have it right now -- Article 9(f) to the plan. And we've modified Article 9(f) to address certain of those concerns, and we believe that, as modified, that the injunction provision implements and enforces the plan's discharge, release, and exculpation provisions to prevent parties from pursuing claims in interest that are addressed by the plan and otherwise interfering with consummation and implementation of the plan.

I'd like to put up the first paragraph of the injunction on the screen now.

Okay, Your Honor. The first paragraph, all it does is prohibits the enjoined parties from taking action to interfere with consummation or implementation of the plan. I suspect a sentence like that is probably in hundreds of plans in the Fifth Circuit and elsewhere.

Initially, to address a concern that it applied to too

many parties, the Debtor added a definition in the revised plan that defines "enjoined parties," which I'd like to now put that definition up on the screen.

The changes -- it's a little hard to read there, but you have it in the -- oh, there you go. The changes made clear that only parties who have a relationship to this case, either holding a claim or interest, having appeared in the case, be a -- or be a party in interest, Jim Dondero, or related entity, or related person of the foregoing are covered. The claim objectors argue that the word "implementation and consummation" is vague, or vague and unclear. Your Honor, these terms are both defined in the Bankruptcy Code and under the case law, and they're, as I said, common features of many plans.

Section 1123(a)(5) of the Code provides that a plan shall provide for its implementation, and identifies a list of items that the plan can include. Article 4 of our plan is defined as "Means of Implementation of This Plan," and describes the various corporate steps required to implement the provisions of the plan, including canceling equity interests, creation of new general partners and a limited part of the Reorganized Debtor, the restatement of the limited partnership agreement, and the establishment of the various trusts.

Paragraph 1 rightly and appropriately enjoins efforts to interfere with these steps.

Nor is the term "consummation of the plan" vague. "Consummation" also is a commonly-used term and has been defined by the Fifth Circuit and the Code. 1102 -- 1101(2) defines "Substantial Consummation" to be the transfer of assets to be transferred under the plan, the assumption by the debtor of the management of all the property dealt with by the plan, and the commencement of distributions under the plan.

Section 1142 gives the Court authority to direct a party to perform any act necessary for consummation of a plan. And as the Fifth Circuit, in *United States Brass Corp.*, which is said in our material, states, said the Bankruptcy Court had post-confirmation jurisdiction to enforce the unperformed terms of a plan with respect to a matter that could affect the parties' post-confirmation rights because the plan had not been fully consummated.

And Your Honor just wrote on this issue last year in the *Senior* -- the *Texas* -- the *TXMS Real Estate v. Senior Care* case, and you cited to *U.S. Brass* to find that, in that case, post-confirmation jurisdiction existed to resolve a dispute relating to an assumed contract because the matter related to interpretation, implementation, and execution of the plan.

Accordingly, Your Honor, neither implementation or consummation are vague, and the first paragraph of the injunction is necessary and appropriate to enforce the Debtor's discharge.

As I said before, I will leave it to Mr. Kharasch to address specifically the concerns that the Advisor and the Funds have with the injunction.

The second and third paragraphs of the injunction, Your Honor, certain parties have objected to them on the ground that they constitute an improper release of the independent directors as well as the release of claims against the Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust, entities that will not have come into existence until after the effective date.

We believe we have addressed these concerns by modifications to the second and third paragraphs of the injunction, which I would now like to put the second and third paragraphs on the screen.

(Pause.)

MR. POMERANTZ: As that is happening, Your Honor, I will -- there we go.

We believe that the changes that were made to these paragraphs should address the Objectors' concerns.

First, as with the first paragraph, we have created a defined term of "Enjoined Parties" who are subject to the injunction which is narrower than all persons, I believe, or all entities that was included in the prior plan. So we've narrowed that.

"Enjoined Parties" are generally defined, as I mentioned

before, as entities involved in this case or related to Jim Dondero, or have appeared in this case.

Second, we have removed independent directors from these paragraphs to address the concern that the injunction was a disguised third-party release.

Third, we have removed the Reorganized Debtor and the Claimant Trust from the second paragraph and moved them to the third paragraph. We did this to make clear that the Reorganized Debtor and Claimant Trust were only getting the benefit of the injunction as the successors to the Debtor. As the Reorganized Debtor and the Claimant Trust receives the property from the Debtor free and clear of all claims and interests and equity holders under 1141(c), they are entitled to the benefit of the injunction.

Fourth, we have addressed the concern that the injunction improperly affected set-off rights. We added language to make clear that the injunction would only affect the parties' set-off of an obligation owed to the Debtor to the extent that that was permissible under 553 and 1141 of the Bankruptcy Code.

In other words, we are punting the issue for another day, and there's nothing in the plan that gives the Debtor any more set-off rights than it otherwise has under the Bankruptcy Code.

Lastly, Your Honor, certain Objectors have argued that the

injunction somehow prevents them from enforcing the rights they have under the plan or the confirmation order. We don't really understand this concern, as the language leading into the second paragraph of the injunction says, except as expressly provided in the plan, the confirmation order, or a separate order of the Bankruptcy Court.

With these modifications, Your Honor, the provisions do nothing more than implement 1123(b)(6) and 1141 by preventing parties from taking actions to interfere with the Debtor's plan.

The Court has also heard testimony from Mr. Seery regarding the importance of the injunction to implementation of the plan. He testified that he intends to monetize assets in a way that will maximize value. And to effectively do that, he has testified that the Claimant Trust needs to be able to pursue its objectives without interference and continued harassment from Mr. Dondero and his related entities.

In fact, Mr. Seery testified that if the Claimant Trust were subject to interference by Mr. Dondero, it would take him more time to monetize assets, they would be monetized for less money, and creditors would be harmed.

If Your Honor doesn't have any questions for me on the injunction provisions, I'd like to turn to the last part of the injunction, which is really the gatekeeper provision.

THE COURT: All right. You may.

MR. POMERANTZ: Your Honor, the last paragraph in Article 9(f) is really not an injunction but is rather a gatekeeper provision. And as originally drafted, it'd do two things: first, it'd require that before any entity, which is defined very broadly, could file an action against a protected party relating to certain specified matters, the entity would have to seek a determination from this Court that the claim represented are colorable claim of bad faith, criminal conduct, willful misconduct, fraud, or gross negligence. The specified matters to which the gatekeeper provision would apply included the Chapter 11 case, negotiations regarding the plan, the administration of the plan, the property to be distributed under the plan, the wind-down of the Debtor's business, the administration of the Claimant Trust, or transactions related to the foregoing.

Subject to certain exceptions for Dondero-related parties, protected parties were defined to include the Debtor, its successors and assigns, indirect and direct, majority-owned subsidiaries and managed funds, employees, Strand, Reorganized Debtor, the independent directors, the Committee and its members, the Claimant Trust, the Claimant Trustee, the Litigation Trust, the Litigation Sub-Trustee, the members of the Oversight Committee, retained professionals, the CEO and CRO, and persons related to the foregoing. Essentially,

parties related to the pre-effective-date administration of the estate or the post-confirmation implementation of the plan.

Second, the gatekeeper provision as originally presented gave the Bankruptcy Court exclusive jurisdiction to adjudicate any cause of action that it determined would pass through the gate. The gatekeeper provision, Your Honor, is not a release in any way. Rather, it permits enjoined parties who believe they have a claim against the protected parties to pursue such a claim, provided they first make a showing that the claim is colorable to the Bankruptcy Court.

Several parties, Your Honor, objected to the Bankruptcy Court having exclusive jurisdiction to adjudicate the claims that pass through the gate. The Debtor believes that the Bankruptcy Court would ultimately have jurisdiction of any of those claims that pass through the gate. However, the Debtor did, upon reflection, appreciate the concern that if the Court agreed to that now, it would essentially be determining its jurisdiction before a claim was filed.

Accordingly, in the January 22nd plan, Your Honor, we amended the provision to provide that the Bankruptcy Court will only have jurisdiction over such claims to the extent it was legally permissible to do so, essentially deferring the issue to a later time.

And as Your Honor, I believe, in one of cases called the

Icing on the Cake, the retention and jurisdiction provisions in the plan only are to the extent under applicable law and are quite broad and include the things that we would have the Court -- have jurisdiction for the Court, otherwise determined.

The Court made some other changes to the gatekeeper provision, and I would like to place the amended gatekeeper provision on the screen right now. In addition to the change I mentioned, the Debtor made the following changes: the provision is limited now to apply only to enjoined parties, rather than any entity. Than any entity. Much narrower. The provision added the administration of the Litigation Sub-Trust to the matters to which the provision would apply. The provision makes clear now that any claim, including negligence, is a claim that could be sought and pursued through the gatekeeper function. And the provision made some other syntax changes.

We believe, Your Honor, with these changes, we believe that the gatekeeper provision is within the Court's jurisdiction and it's appropriate to include under the plan.

But certain parties have argued that the Court does not have the authority, the jurisdictional authority to perform the gatekeeper function, separate and apart from whether it has jurisdiction to adjudicate the claims that pass through the gate.

Your Honor, we submit that these arguments represent a fundamental misunderstanding of Bankruptcy Court jurisdiction and the Court's authority to make sure the Debtor is free of interference in carrying out the plan which I'll get to in a couple moments.

As a preliminary matter, Your Honor, it is important for the Court to remember that Paragraph 10 of the January 9 order already contains a gatekeeper provision as it relates to the independent directors and their agents. And as I mentioned on a couple of occasions, that order is not going away, it doesn't expire by its terms, and it cannot be collaterally attacked in this forum.

The Debtor does acknowledge, though, that the gatekeeper provision in the plan is broader in terms of the people it protects and it applies to post-confirmation matters.

Before I address the Court's authority to approve the gatekeeper provision, I want to summarize the evidence that it has heard from Mr. Seery and Mr. Tauber regarding why the gatekeeper is so important a provision to the success of the plan.

Although the Court is all too familiar with the history of litigation initiated by and filed against Mr. Dondero and his related affiliates, Mr. Seery spent some time on the stand testifying about the litigation so the Court would have a complete record for this hearing. He testified that prior to

the petition date, the Debtor faced years of litigation from Mr. Terry and Acis that led to the *Acis* bankruptcy case, which Your Honor has said many times it's still in your mind. Years of litigation with the Redeemer Committee which precipitated the filing of a bankruptcy case and resulted in an award very critical of the Debtor's conduct. Years of litigation with UBS. Years of litigation with Patrick Daugherty. And we placed all the dockets for all these matters before the Court.

Also, during the bankruptcy and after the Committee essentially rejected the Debtor's pot plan proposal and indicated -- and the Debtor indicated it would be terminating the shared service agreements with Mr. Dondero and his related entities, the Debtor was the subject of harassment from Mr. Dondero and related entities which resulted in the temporary restraining order against him, a preliminary injunction against him, a contempt motion, which Your Honor is scheduled to hear Friday, a motion by the Debtor's controlled -- by the Dondero-controlled investors and funds in CLO managed -- managed by the Debtor, which the Court referred to that motion as being frivolous and a waste of the Court's time. Multiple plan objections, most of which are focused on allowing the Debtors to continue their litigation crusade against the Debtor and its successors post-confirmation. An objection to the Debtor approval of the Acis order and a subsequent appeal. An objection to the HarbourVest settlement and subsequent

appeal. A complaint and injunction against the Advisors and the Funds to prevent them from violating Paragraph 9 of the January 9th order. And a temporary restraining order against those parties, which was by consent.

Mr. Dondero's counsel tends to argue that he is the victim here and that the litigation is being commenced against him and -- instead of by him. That response does not even deserve a response, Your Honor. It is disingenuous.

Mr. Tauber testified that he was part of the team at Aon that sourced coverage for the independent directors after their appointment in January 2020 and that he has over 20 years of underwriting experience. He testified that at Aon he builds bespoke insurance programs which are not cookie-cutter programs for his clients, with an emphasis on D&O and E&O. And he was asked by the independent board to obtain D&O and E&O insurance after the board's appointment on January 9th.

Based upon the process Aon conducted in reaching out to insurance carriers, Mr. Tauber testified that Aon was only able to obtain D&O insurance based upon the inclusion of Paragraph 10 of the January 9 order, the gatekeeper provision. I know Mr. Taylor said that that was spoon-fed to the insurers, but Mr. Tauber's testimony is they knew about Mr. Dondero and they knew about his litigation tactics, so it is not a good inference to be made from the testimony that they would not have required something. They probably would have

just said no.

Aon has now been -- Mr. Tauber testified that Aon has now been asked to obtain D&O coverage for the Claimant Trustee, the Litigation Trustee, the Oversight Committee, the members, the Claimant Trust, and the Litigation Sub-Trust. He testified that he and Aon have approached the insurance carriers that they believe might be interested in underwriting coverage.

And no, he hasn't approached every D&O and E&O carrier out there, and there may be, just like an investment banker doesn't have to approach everyone. They are experts in the field, and he testified they approached the people they thought would likely be willing or interested and potentially be willing to extend coverage. And as a result of Aon's efforts, Mr. Tauber has determined that there's a continued resistance to provide any coverage that does not contain an exclusion for actions relating to Mr. Dondero or his related entities. And he further believes that all carriers that will -- that have discussed a willingness to provide coverage will only do so if there is a gatekeeper provision, and only one carrier will agree to provide coverage without a Dondero exclusion.

Mr. Tauber testified that he believes that any ultimate policy will provide that if at any time the gatekeeper provision is not in place, either the carrier will not cover

any actions related to Mr. Dondero or his affiliates or that the coverage will be vacated or voided.

Based upon the foregoing record, Your Honor, which is uncontroverted, there's ample justification on a factual basis for approval of the gatekeeper provision.

I will now turn to the Court's authority to approve the gatekeeper provision.

There are three alternative bases upon which the Court can approve the gatekeeper provision. First, several provisions of the Bankruptcy Code give broad authority to approve a provision like the gatekeeper provision.

Second, the Court can analogize to the Barton Doctrine the facts and circumstances in this case and authorize the Court to act as a gatekeeper to prevent frivolous litigation from being filed against court-appointed officers and directors and those that will lead the post-confirmation monetization of the estate's assets.

And third, Your Honor, the Court can find that Mr. Dondero and his entities are vexatious litigants, and use the gatekeeper provision as a sanction to prevent the filing of baseless litigation designed merely to harass those in charge of the estate post-confirmation.

So, Bankruptcy Court authority. Your Honor, there are several provisions in the Bankruptcy Code which we rely on to support the Court's authority. First, Section 1123(a)(5)

permits the plan to approve adequate means of implementation, and contains a long, non-exclusive list. Mr. Seery's testimony is uncontroverted that a gatekeeper provision is necessary for the adequate implementation of the plan.

Second, Your Honor, 1123(b)(6) authorizes a plan to include any appropriate provision in a plan not inconsistent with any other provision in this Code. There are not any provisions and none have been cited by the Objectors that would prohibit a gatekeeper provision. Section 1141 effectively holds that the terms of a plan bind the debtor and its creditors and vest property in a reorganized debtor, free and clear of the interests of third parties.

If nothing else, Your Honor, the spirit of 1141 allows the Court to prevent, in appropriate cases, vexatious litigation by unhappy creditors and parties in interest from torpedoing the plan.

1142(b), Your Honor, provides that the confirmation -- that, after confirmation, the Court may direct any parties to perform any act necessary for the consummation of the plan, and requiring the party to seek court-approval before filing an action is certainly an act.

And lastly, Your Honor, Section 105 allows the Court to enter orders necessary to order other things, enforce orders of the Court like the confirmation order, and prevent an abuse of process which would certainly occur if baseless litigation

were filed against the parties in charge of the Reorganized Debtor and the trust vehicles entrusted with carrying out the plan.

Your Honor, gatekeepers are not a novel concept and have been approved by courts in appropriate circumstances. In the *Madoff* cases, the Court has been the gatekeeper post-confirmation to determine whether investor claims are derivative or direct claims.

In *General Motors*, the Court has been the gatekeeper post-confirmation to determine whether product liability claims are proper claims against the reorganized debtor.

Closer to home, Judge Lynn, Mr. Dondero's counsel, approved a gatekeeper provision, arguably even more far-reaching than the provision here, in the *Pilgrim's Pride* case. In that case, Judge Lynn held that *Pacific Lumber* prevented him -- prevented the Court from approving the exculpation provision in the plan. However, he did hold that it was appropriate for the Court to ensure that debtor representatives are not improperly pursued for their good-faith actions by requiring that any actions against the debtor or its representatives, and further, on the performance of their obligations as debtor-in-possession, be heard exclusively before the Bankruptcy Court.

And *Pilgrim's Pride* is not the only case in this district to include a gatekeeper provision, as Judge Houser approved

one in the *CHC Group* in 2016, which is cited in our materials.

The theme in all these cases, Your Honor, is that there are circumstances where it is necessary and appropriate for the Bankruptcy Court to act as a gatekeeper as a means of reducing litigation that could interfere with a confirmed plan and that a Court has the authority to approve such provisions.

The Objectors argue that the Bankruptcy Court does not have jurisdiction to approve that provision. The Debtor understands the argument as it related to the prior provision, which gave the Court exclusive jurisdiction over any claim it found colorable, and we've amended the plan to address that issue. The jurisdiction to deal with those claims could be left to a later day.

But to the extent the Objectors still pursue the jurisdiction argument in light of the current provision, they're really conflating two very different things: the ability to determine whether a claim is colorable and the ability to adjudicate that claim if the Court determines it's colorable.

None of the authorities cited by the Objectors hold that the Court is without jurisdiction to approve a gatekeeper provision like the one here. So, rather, what they do is they try to -- they argue, based upon the *Craig's Stores* case, which is narrower than other circuits of post-confirmation jurisdiction in the Bankruptcy Court, and argue that the

gatekeeper provision doesn't fall within that. But that -- such reliance is misplaced, Your Honor.

Craig held that the Bankruptcy Court did not have jurisdiction to adjudicate a post-confirmation dispute over a private-label credit card agreement between the debtor and the bank. In declining to find jurisdiction, the Fifth Circuit remarked that there was no antagonism or claim pending between the parties as of the reorganization and no facts or law deriving from the reorganization or the plan was necessary to the claim asserted by the debtor.

However, in so ruling, Your Honor, the Fifth Circuit did reason that post-confirmation jurisdiction in the Bankruptcy Court continues to exist for matters pertaining to implementation and execution of the plan. Requiring parties to seek Bankruptcy Court determination the claim is colorable before embarking on litigation that will impact indemnification rights and affect distributions to creditors is not an expansion of jurisdiction and fits well within the *Craig* reasoning.

Unlike the credit card agreement dispute in *Craig*, Mr. Dondero and his entities have demonstrated tremendous antagonism towards the Debtor. And while the Debtor's plan may be confirmed, further litigation has been threatened by Mr. Dondero. It's in the pleadings. That's one of the reasons Mr. Dondero says his plan is better. It'll avoid

tremendous amount of litigation.

After *Craig*, the Fifth Circuit again examined the bankruptcy court's post-confirmation jurisdiction in the *Stoneridge* case in 2005. In that case, the Fifth Circuit ruled that a bankruptcy court has post-confirmation jurisdiction to resolve a dispute between two nondebtors that could trigger indemnification claims against a liquidating trust formed as a result of a confirmed plan.

And lastly, as I mentioned Your Honor's decision before, the *TXMS Real Estate* case, I think just a couple of months ago, it stands for the proposition that post-confirmation jurisdiction exists for matters bearing on the implementation, interpretation, and execution of a plan. In that case, Your Honor ruled that Your Honor had jurisdiction to resolve a post-confirmation dispute between a liquidating trust formed under a plan and a landlord, the result of which could significantly and adversely affect the value of the liquidating trust and monies available for unsecured creditors.

And you have heard Mr. Seery testify that litigation will have an adverse effect on the ability to make distributions to creditors.

So, Your Honor, under these authorities, the Court undoubtedly would have jurisdiction to act as the gatekeeper for the litigation.

There's also an independent basis for the gatekeeper provision, Your Honor, the Barton Doctrine, which the Court is very familiar from your opinion in the *In re Ondova* case in 2017 and which provides that before a suit may be brought against a trustee, leave of Court is required. In *Ondova*, the Court reviewed the history of the doctrine in connection with litigation brought by a highly-litigious debtor against a trustee and his professionals. This Court noted that there are several important policies followed by the doctrine, including a concern for the overall integrity of the bankruptcy process and the threat of trustees being distracted from or intimidated from doing their jobs. And Your Honor's language still: For example, losers in the bankruptcy process might turn to other courts to try to become winners there by alleging the trustee did a negligent job.

Your Honor, this is precisely what the Debtor is trying to prevent here, Mr. Dondero and his entities from putting the bad experience before Your Honor in this case behind it and going to try to find better luck in a more hospitable court.

Your Honor, the Barton Doctrine originally only applied to receivers, and over the course of time has been extended to apply to various court-appointed fiduciaries, as we have cited in our materials: trustees, debtors-in-possession, officers and directors, employees, and attorneys representing the debtor.

And I expect the Objectors to argue that there is a statutory exception to the Barton Doctrine under 28 U.S.C. 959 and it does not apply to acts or transactions in carrying out business conducted with a property. The exception, Your Honor, is very narrow and was meant to apply for things like slip-and-fall cases. In fact, the Eleventh Circuit in the *Carter v. Rodgers* case, 220 F.3d 1249 in 2000, held that Section 11 -- 28 U.S.C. 959(a) does not apply to suits against trustees for administering or liquidating the bankruptcy estate.

The Objectors also argue that the gatekeeper provision violates *Stern v. Marshal*. However, as the Court acknowledged in *Ondova*, the Fifth Circuit in *Villegas v. Schmidt* has recognized that the Barton Doctrine remains viable post-*Stern v. Marshal*. The Fifth Circuit reasoned that while Barton Doctrine is jurisdictional in that a court does not have jurisdiction of an action if preapproval has not been obtained, it does not implicate the extent of a bankruptcy court's jurisdiction to adjudicate the underlying claim, precisely the distinction we're making here. The bankruptcy court would be the gatekeeper for deciding whether the claim passes through the gate, and then after will decide if it has jurisdiction to rule on the underlying claim.

And this is important especially in a case like this, Your Honor, where Your Honor has had extensive experience with the

parties and is in the best position to determine whether the claims are valid or attempted to be used as harassment.

The Objectors will complain about the open-ended nature of the gatekeeper provision, whether it will or won't apply after the case is closed or a final decree is issued, and the unfair burden of their rights.

Your Honor has a previous reported opinion where basically jurisdiction does extend after a case is closed or a final decree is entered, so that issue is a red herring.

As Your Honor is well aware, it's a decade-long -- a decade of litigation against the Dondero-controlled entities that caused the Highland bankruptcy. And the Court is very well aware of the litigation that occurred in *Acis*, very well aware of the litigation that's occurred here that I mentioned a few minutes ago. Your Honor, it is not over, you'll be presiding over the contempt hearing.

And if the Court needs yet another ground to approve the gatekeeper provision, the Debtor submits that the procedure is an appropriate sanction for Dondero's vexatious litigation activities. We cited the *In re Carroll* case in the Fifth Circuit of 2017 that held that a bankruptcy court has the authority to enjoin a litigant from filing any pleading in any action without the prior authority from the bankruptcy court.

And in affirming the decision of the bankruptcy court, the Fifth Circuit commented on the reasons the bankruptcy court

gave for its ruling. After recounting the bad faith of appellants, the bankruptcy court determined that the Carrolls' true motives were to harass the trustee and thereby delay the proper administration of the estate, in the hope that they would be able to retain their assets or make pursuit of the assets so unappealing that the trustee would be compelled to settle on terms favorable to appellants.

Sounds familiar, Your Honor. The same can certainly be said about what Mr. Dondero is doing in this case.

And to make a showing that a party is vexatious litigant, the Court must find that the party has a history of vexatious and harassing litigation, whether the party has a good faith -- the litigation or has filed it as a means to harass, the burden to the Court and other parties, and the adequacy of alternative sanctions.

And as Your Honor is well aware from all the litigation, Your Honor is well, well able to make the finding required for the vexatious litigation finding.

But here, we don't ask for the drastic sanction of enjoining from any further filings. Rather, we just ask for a less-severe sanction, requiring Mr. Dondero and his entities to first make a showing that he has a colorable claim.

The Fifth Circuit in *Baum v. Blue Moon*, 2007, did exactly that. In *Baum*, the district court barred a vexatious litigant from initiating litigation without first obtaining the

approval of the district court. Ultimately, the matter reached the Fifth Circuit after the district court had modified the pre-filing injunction to limit it to a certain case, and then broadened it again based upon continued bad faith conduct.

On appeal, the Fifth Circuit, citing several prior cases, noted that a district court has the authority to impose a pre-filing injunction to defer vexatious, abusive, and harassing litigation.

And for those reasons, Your Honor, the Debtor asks the Court to overrule any objections to the gatekeeper provision.

Your Honor, I was just going to then go to the plan modification provisions, but I wanted to stop and see if you had any questions at this point.

THE COURT: I do not. Let's give him a time estimate, Nate. About how --

THE CLERK: Twenty.

MR. POMERANTZ: I have another five or six minutes, I think, based upon --

THE COURT: Okay.

MR. POMERANTZ: And then I'll be ready to turn it over to --

THE COURT: Okay.

MR. POMERANTZ: -- to Mr. Kharasch.

THE COURT: All right. Yes. You've got -- you've

done an hour and 33 minutes. So you have about, I guess, 37 minutes left. Okay. Go ahead.

MR. POMERANTZ: Thank you, Your Honor.

I would like to address the modifications of the plan that were contained in our January 22nd plan and the additional changes filed on February 1, several of which I have referred.

As a preliminary matter, Your Honor, under 1127(b), the Debtor can modify a plan at any time prior to confirmation if -- and not require resolicitation if there's no adverse change in the treatment of claim or interest of any equity holder.

With that background, I won't go through the changes we made that I've already discussed, but I will point out a couple, Your Honor, that I would like to point out now. We have modified the plan with respect to conditions of the effective date in Article 8. First, a condition to the effective date will now be entry of a final order confirming a plan, as opposed just to entry of order. And final order is defined as the exhaustion of all appeals.

In addition, the ability to obtain directors and officers insurance coverage on terms acceptable to the Debtor, the Committee, the Claimant Trustee, the Claimant Trustee Oversight Board, and the Litigation Trustee is now a condition to the effective date.

The Court heard testimony today and has experienced firsthand the litigiousness of Mr. Dondero and his related

entities. And the Court heard testimony from Mr. Tauber and Aon that the D&O insurance will not be available post-effective date without assurances that the gatekeeper provision will be in effect for the duration of the policy and any run-off period.

Mr. Tauber further testified that he expected the final terms from the insurance carrier to provide that if the confirmation order was reversed on appeal and the gatekeeper was removed, it would void -- it would either void the directors and officers coverage or it'd result in a Dondero exclusion.

Mr. Dondero and his entities are no strangers to the appellate process, as Your Honor knows. They appealed several of your orders, and continue the tack in this case, having appealed the Acis and the HarbourVest orders and the preliminary injunction. It would not surprise the Debtor if Mr. Dondero and his entities appealed your confirmation order, if Your Honor decides to confirm the plan.

The Debtor is confident that it will prevail on any appeal in the confirmation order, as we believe the Debtor has made a compelling case for confirmation.

The Debtor also believes a compelling case exists that if the plan went effective without a stay pending appeal, that the appeal would be equitably moot, but we understand we are facing headwinds from the courts, bankruptcy court have

addressed that issue before.

However, given the effect a reversal would have on the availability of insurance coverage, the Claimant Trustee, the Claimant Oversight Committee, and the Litigation Trustee are just not willing to take that risk.

We are hopeful that Mr. Dondero and his entities will recognize that any appeal is futile and step aside and let the plan proceed and become effective.

If Mr. Dondero and his related entities do appeal the confirmation order, preventing it from becoming final and preventing the effective date from the occurring, the Debtor intends to work closely with the Committee to ratchet down costs substantially and proceed to operate and monetize assets as appropriate until an order becomes final.

None of these modifications adversely affect the treatment of claims or interests under the plan, Your Honor, and for those reasons, Your Honor, we request that the Court approve those modifications.

And with that, I would like to turn the podium over to Mr. Kharasch to briefly address the remaining CLO objections.

THE COURT: All right. Mr. Kharasch?

CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. KHARASCH: Good afternoon, Your Honor. I'll be as brief as possible. I know we're under a deadline.

As you've heard yesterday, you've heard before in other

proceedings, Your Honor, the CLO Objecting Parties, the so-called investors, do have rights under the CLO management agreements and indentures, including contractual rights to terminate the management agreements under certain circumstances.

What they complain about today, Your Honor, is that the injunction language in the plan, including the language preventing actions to interfere with the implementation and consummation of the plan, is so broad and ambiguous that their rights are or may be improperly impacted, especially any rights to remove the manager for acts of malfeasance.

But the Debtor is primarily relying, Your Honor, not so much on the plan injunctions but on the clear provisions of the January 9 order, to which Mr. Dondero consented and which provides that Mr. Dondero shall not cause any of his related entities to terminate any agreements with the Debtor.

Yes, that is a broad provision, but it is very clear, and it does not even allow the CLO Objecting Parties to come to court under a gatekeeper-type provision. But that is what Mr. Dondero consented to on behalf of himself and his related entities.

Important to note, Your Honor, we are not here today to litigate who is and who is not a related entity. That will be left for another day. However, Your Honor, we have considered these issues, including last night and this morning, and we

are going to propose -- well, we will modify our plan through a provision in the confirmation order to provide the following: Notwithstanding anything in the plan or the January 9 order, the CLO Objecting Parties will not be precluded from exercising their contractual or statutory rights in the CLOs based on negligence, malfeasance, or any wrongdoing, but before exercising such rights shall come to this Court to determine whether those rights are colorable and to also determine whether they are a related entity. If the Court has jurisdiction, the Court can determine the underlying colorable rights or claims.

This does not impact the separate settlement we have with CLO Holdco, Your Honor.

We think that such modification addresses some of the concerns raised yesterday by the objecting parties by providing more clarity as to what the plan is doing and not doing with respect to the plan and the January 9 order, and we think it is also a fair resolution of some legitimate concerns.

So, with that, Your Honor, we think that, with that clarification that we did not have to make but are willing to make, that this should fully satisfy the CLO Objecting Parties with regard to their objections to the injunction and the gatekeeper.

Thank you, Your Honor.

THE COURT: All right. Mr. Clemente?

CLOSING ARGUMENT ON BEHALF OF THE CREDITORS' COMMITTEE

MR. CLEMENTE: Yes, Your Honor. And I actually am going to be brief. Mr. Pomerantz's discussion, obviously, was very, very thorough, so I'm able to cut out a lot of stuff.

Thank you, Your Honor. Matt Clemente, Sidley Austin, on behalf of the Committee.

The plan, Your Honor, meets the confirmation standards and should be confirmed. Mr. Pomerantz covered a lot of ground, and I will endeavor not to repeat that, but there are a few points that I think the Committee wishes to emphasize.

Your Honor, since I first appeared in front of you, I have maintained consistently that no plan can or should be confirmed without the consent of the Committee. Your Honor, in her wisdom, understood this immediately, as it was obvious -- it was the obvious conclusion, given the makeup of the creditor body, the asset pool, and the impetus for the filing of the case.

Unfortunately, not everyone came to this conclusion so easily, and it took much hard-fought negotiations as well as a defeated disclosure statement, among other things, and tireless dedication and commitment by each individual Committee member to drive for a value-maximizing plan that is in the best interests of its constituencies and for us to get to where we are today.

And where we are today, Your Honor, is at confirmation for a plan that the Committee unanimously supports, which was the inevitable outcome for this case from the very beginning.

I've also said, Your Honor, that context is critical in this case. It has been from the beginning, and it remains so now. Mr. Draper, interestingly, began his comments yesterday by saying that even a serial killer is entitled to *Miranda* rights. While I will admit that at times the rhetoric in this case has been heated, I have never certainly likened Mr. Dondero to a serial killer. But the record shows, and Mr. Dondero's own words and actions show, that he is, in fact, a serial litigator who has no hesitation at all to take any position in an attempt to leverage an outcome that suits his self-interest. And he has no hesitation at all to use his many tentacles in a similar fashion.

That is a very important context in which the Court should view the remaining objections of the Dondero tentacles and weigh confirmation of the Debtor's plan.

Against this context of a serial litigator, Your Honor, we have a plan supported by each member of the Official Committee of Unsecured Creditors, accepted by two classes of claims, Class 2 and Class 7, and holders of almost one hundred percent in amount of non-insider claims in Class 8.

The parties that have voted against the plan are either employees who are not receiving distributions under the plan

or are insiders or parties related to Mr. Dondero.

The overwhelming number and amount of creditors who are receiving distributions under this plan, therefore, have accepted the plan. The true creditors and economic parties in interest have spoken, they have spoken loudly, and they have spoken in favor of confirming the plan.

Your Honor, I'm not going to address the technical requirements, as Mr. Pomerantz did that. So I'm going to skip over my remarks in that regard, except I do want to emphasize the remarks regarding the gatekeeper, exculpation, and injunction provisions as they're of critical importance to the plan.

The testimony has shown and the proceedings of this case has shown, again, Mr. Dondero is a serial litigator with a stated goal of causing destruction and delay through litigation.

The testimony has further shown that none of the independent board members would have signed onto the role without the gatekeeper and injunction provisions and the indemnity from the Debtor.

Therefore, it follows that such provisions are necessary to entice parties to serve in the Claimant Trustee and other roles under the plan, which, as I remarked in my opening comments, are integral to providing the structure that the creditors believe is necessary to unlocking the value and

unlocking themselves from the Dondero web.

Regarding the exculpation and injunction provisions specifically, Your Honor, the Court will recall that the Committee raised objections to them in connection with the first disclosure statement hearing. In response, the Debtor narrowed the provisions, and the Committee believes they comply with the Fifth Circuit precedent, as Mr. Pomerantz ably walked Your Honor through.

And to be clear, Your Honor, not only does the Committee believe the exculpation and injunction provisions comply with Fifth Circuit law, the Committee does not believe the estate is harmed by such provisions, as the Committee does not believe there are any cognizable claims that could or should be raised that would otherwise be affected by the exculpation or injunction, and, frankly, with respect to the release that Mr. Pomerantz walked Your Honor through with respect to the directors and the officers.

Regarding the gatekeeper, Your Honor, Your Honor presciently approved it in her January 9th order, and the developments since then only serve as further justification for including it in the plan and confirmation order. Mr. Dondero is a serial and vexatious litigator, and the instruments put in place under the plan to maximize value for the creditors and to oversee that value-maximizing process must be protected, and the gatekeeper function serves that

protection while also, importantly, as Mr. Pomerantz pointed out, providing Mr. Dondero with a forum to advance any legitimate claims he and his tentacles may have.

In short, Your Honor, the gatekeeper provision is necessary to the implementation to the plan, is fair under the circumstances of the case, and is therefore within this Court's authority, and it is appropriate to approve.

Your Honor, in sum, it has been a long road to get here today, but we are finally here. And we are here, Your Honor, I believe in large part as a result of the tireless efforts of the individual members of my Committee, and for that I thank them.

The Committee fully supports and unanimously supports confirmation of the plan. As demonstrated by the evidence, the plan meets all the requirements of the Bankruptcy Code. The Committee believes the plan is in the best interests of its constituencies. And therefore the Committee, along with two classes of creditors and the overwhelming amount of creditors in terms of dollars, urge you to confirm the plan.

That's all I have, Your Honor, but I'm happy to answer any questions you may have for me.

THE COURT: Okay. Not at this time.

Nate, how much time --

(Clerk advises.)

THE COURT: Twenty-five minutes remaining? All

right. Just so you know, you've got a collective Debtor's counsel/Committee's counsel 25 minutes remaining for any rebuttal, if you choose to make it.

Let's take a five-minute break, and then we'll hear the Objectors' closing arguments. Okay.

THE CLERK: All rise.

(A recess ensued from 2:00 p.m. until 2:06 p.m.)

THE COURT: All right. Please be seated. We're going back on the record in Highland. We're ready to hear the Objectors' closing arguments. Who wants to go first?

MR. DRAPER: Your Honor, this -- this is Douglas Draper. I get the joy of going first.

THE COURT: Okay.

CLOSING ARGUMENT ON BEHALF OF THE GET GOOD AND DUGABOY TRUSTS

MR. DRAPER: We've heard a great deal of testimony about the Debtor's belief that the circumstances in this case warrant an exception to existing Fifth Circuit case law, the Bankruptcy Code, and Court's post-confirmation jurisdiction.

I would not be standing here today objecting to the plan if the Debtor didn't attempt to extend, move past and beyond the Barton Doctrine, move beyond 1141, move beyond *Pacific Lumber*. In fact, I think I heard an argument that *Pacific Lumber* is not applicable and this Court should disregard Fifth Circuit case law.

Let's start with the exculpation provision. And the focus

of this case has been, and what we've heard over the last few days, is about the independent directors. I understand there was an order entered earlier, the order stands, and the order is applicable in this case. It cuts off, however, when we have a Reorganized Debtor, because these independent directors are no longer independent directors. It cuts off when we have a new general partner.

And so the protections that were afforded by that order do not need to be afforded to the new officers and new directors of the new general partner. And in fact, the protections that they're entitled to are completely different than the protections that were entitled -- that are covered by the order that the Court has looked at.

Let's first focus on, however, the exculpation provision. And I wanted to ask the Court to look at the exculpated parties. Have to be very careful and very interest -- and focus solely on the independent directors. But if you look at the parties covered by exculpation provision, it includes the professionals retained by the Debtor. My reading of *Pacific Lumber* is that neither the Creditors' Committee counsel nor the Debtor can be covered by an exculpation provision. This in and of itself makes the plan non-confirmable. This exculpation provision is unwarranted and unnecessary.

Two, --

THE COURT: Well, let's drill down on that.

MR. DRAPER: -- we have --

THE COURT: Let's drill down on that. Mr. Pomerantz says that this wasn't what they considered one way or another by *Pacific Lumber*. Debtor, debtor professionals. Okay? Do you disagree with that?

MR. DRAPER: I disagree with that. *Pacific Lumber* said you could only have releases and exculpations for the Creditors' Committee members. And the rationale behind that was that those people volunteered to be part and parcel of the bankruptcy process, that those parties did not get paid. Here, we have two professionals who both volunteered and are being paid, and are not entitled to an exculpation under *Pacific Lumber*. They're not entitled to a --

THE COURT: Okay. So you say *Pacific* --

MR. DRAPER: -- release. Now, ultimately, they --

THE COURT: -- *Pacific Lumber* categorically rejected all exculpations except to Creditors' Committee and its members. That's your --

MR. DRAPER: I agree. That's --

THE COURT: -- interpretation of *Pacific Lumber*?

MR. DRAPER: Yes.

THE COURT: Okay. All right. So you just absolutely disagree, one by one, with every one of the arguments, that it was really -- the only thing before the Fifth Circuit was plan sponsors, okay? A plan proponent that I think was like a

competitor previously of the debtor, and I think a large creditor or secured creditor. I think those were the two plan proponents.

So you disagree -- I'm going to, obviously, go back and line-by-line pour through *Pacific Lumber*, but you disagree with Mr. Pomerantz's notion that, look, it was really a page and a half or two of a multipage opinion where the Fifth Circuit said, no, I don't think 524(e) is authority to give exculpation from postpetition liability for negligence as to these two plan sponsors. And I guess it was also -- I don't know. They say, Pachulski's briefing says it was really only looking at these two plan sponsors and the Committee and its members on appeal, you know, going through the briefing, and in such, you can see that these were all that was presented and addressed by the Fifth Circuit. You disagree with that?

MR. DRAPER: Look, I know the facts of *Pacific Lumber* and they -- I know what the posture of the case was. However, the literal language by the opinion in it, it transcends just a dispute in the case. And I think the U.S. Trustee's position that this exculpation provision is correct as a matter of law support -- is further evidence of the fact that the U.S. Trustee, as watchdog of this process, and *Pacific Lumber* say this cannot be done, period, end of story.

THE COURT: Okay. So you, at bottom, just totally disagree with Mr. Pomerantz? You say *Pacific Lumber* is

actually a very broad holding, and I guess, if such, there's a conflict among the Circuits, right?

MR. DRAPER: Well, that's okay.

THE COURT: So, --

MR. DRAPER: I mean, quite frankly, *Pacific Lumber* is binding on you.

THE COURT: Understood.

MR. DRAPER: There may be a conflict in the Circuits, and ultimately the Supreme Court may make a decision and decide who's right and who's wrong.

But for purposes of today and for purposes of this exculpation provision and for purposes of this confirmation, *Pacific Lumber* is the applicable law.

THE COURT: Okay. Well, again, this is a hugely important issue, although in many ways I don't understand why it is, because we're just talking about postpetition acts and negligence, okay? You know, many might say it's much ado about nothing, but it's front and center of your objection. So I guess I'm just thinking through, if the Fifth Circuit was presented these exact facts and was presented with the argument, you know, the *Blixseth* case says 524(e) has nothing to do with exculpation because exculpation is a postpetition concept, and it's just talking about standard liability -- these people aren't going to be liable for negligence; they can be liable for anything and everything else -- if presented

with that *Blixseth* case, you know, there are several arguments that Mr. Pomerantz has made why, if you accept that 524(e) might not apply here, let's look at the reasoning, the little bit of reasoning we had of *Pacific Lumber*, that it was really a policy rationale, right? These independent fiduciaries, strangers to the company and case, they'd never want to do this if they knew they were vulnerable for getting sued for negligence. Mr. Pomerantz's argument is that these independent board members are exactly analogous to a Committee, more than prepetition officers and directors. What do you have to say about that policy argument?

MR. DRAPER: Well, I think there's a huge distinction between the members of a Creditors' Committee who are volunteers and are not paid versus a paid independent director. And more importantly, I think there's a huge difference between a member of a Creditors' Committee who's not paid and counsel for a Debtor and counsel for a Creditors' Committee.

THE COURT: Okay.

MR. DRAPER: Look, you have -- you've --

THE COURT: So, at bottom, it was all about compensation to the Fifth Circuit?

MR. DRAPER: Well, no. The Fifth Circuit policy decision was we want to protect a party who wants to serve and do their civic duty to serve on a Creditors' Committee for no

compensation. I agree with that. I think it's a laudable policy decision. I think it makes sense.

However, the Fifth Circuit in its language basically said, nobody else gets it. It didn't say, look, you know, if there are circumstances that are different, we may look at it differently. The language is absolute in the opinion. And that's what I think is binding and I think that's what the case stands for.

And look, just so the Court is very clear, when Pachulski files its fee application and the Court grants the fee application, any claim against them is res judicata. So, in fact, they do have -- they do have protection. They do have the ability to get out from under. The Court -- they're just not -- they just can't get out from under through an exculpation provision. And the same goes for Mr. Clemente and his firm.

THE COURT: Which, --

MR. DRAPER: And the same goes for DSI.

THE COURT: Which, by the way, that's one reason I think sometimes this is much ado about nothing. It goes both ways. The Debtor professionals, the Committee professionals, estate professionals, they're going to get cleared on the day any fee app is approved, right? I mean, there's Fifth Circuit law that says --

MR. DRAPER: I -- I --

THE COURT: -- says that's res judicata as to any future claims.

But I guess I'm really trying to understand, you know, at bottom, I feel like the Fifth Circuit was making a holding based on policy more than any directly applicable Code provision.

I mean, it's been said, for example, that Committee members, they're entitled to exculpation because of, what, 1103, some people argue, 1103, which subsection, (c)? That's been quoted as giving, quote, qualified immunity to Committees. But it doesn't really say that, right? It's just something you infer.

MR. DRAPER: No. Look, what I think, if you really want to put the two concepts together, I think what the Fifth Circuit, when they told lawyers and professionals that you can't get an exculpation, was very mindful of the fact that you can get released once your fee app is approved. So, as a policy, they didn't need to do it in a exculpation provision. There was another methodology in which it could be done.

THE COURT: Uh-huh.

MR. DRAPER: And so that's -- you have to look at it as holistic and not just focus on the exculpation provision. Because, in fact, they recognize and they -- I'm sure they knew their existing case law on res judicata, and that's why they read it out.

So, honestly, there's no reason for Pachulski to be in here. There's no reason for Mr. Clemente to be in here. There's no reason for the professionals employed by the Debtor to be in here. They have an exit not by virtue of the plan.

THE COURT: But so then it boils down to the independent directors and Strand post January 9th?

MR. DRAPER: It boils down somewhat to them, but quite frankly, there are two parts to this. One is you have an order that's in place. I am not asking the Court to overturn the order. And quite frankly, this provision could have been written to the effect that the order that was in place on -- that's been presented to the Court is applicable and applied.

However, let's parse that down. Let's look at Mr. Seery. The order that's in place solely protects the independent directors acting in their capacities as independent directors. If somebody's acting as -- and if you want to liken it to a trustee, their protection is afforded by the Barton Doctrine, and that's how the protection arises.

What's going on here is they're extending the provisions, first of all, of the Court's order, and number two, of the Barton Doctrine, which are -- which cannot be -- which should not be extended. The law limits what protections you have and what protections you don't have. And we, as lawyers -- look, I'll give you the best example. Think of all the times you

had somebody write in the concept of superpriority in a cash collateral order. And how many times have you had a lawyer rewrite the concept of the issue as to diminution in value? The Code says diminution in value, and quite frankly, a cash collateral order should just say if, to the extent there's diminution in value, just apply the Code section. It's written there. Smart people put it in, and Congress approved it. And once you start getting beyond that, those things should be limited.

And what we have are lawyers trying to extend out by definitions things that the Code limits by its reach. That goes for post-confirmation jurisdiction. That goes for the injunction. That goes for the so-called gatekeeper provision.

And so, again, I would not be here if, in fact, they had said, we have an injunction to the full extent allowed by the Bankruptcy Code and *Pacific Lumber*. We have an exculpation provision that's allowed by virtue of the Court's order. We have the full extent and full reach of the Barton Doctrine. Those are legitimate. Once you start expanding upon that, you're reaching into matters that are not authorized and not allowed.

And then you get into 105 territory, which is always very dangerous. And that's really what's going on here. And that's the tenor of my argument and what I'm trying to say. The Code gives protections. It is not for us to extend the

protections. It's not for us to enlarge them, even under a, gee, the other party's litigious.

And so that's -- let's take *Craig's Store*. Attempted to limit its reach. *Craig's Store* says once you have a confirmed plan, any dispute between the parties, for -- let's take an executory contract. If there's a breach of the executory contract, that's a matter to be handled aft... by another court. It's not a matter to be handled by this Court. This Court lets the parties out.

And in this case, it's even worse, because you basically have a new general partner coming in, you have an assumption of various executory contracts, and you have a -- Strand is no longer present.

If you adopted Mr. Seery's argument, anybody who appeals a decision, questions what he does or how he does it, is a vexatious litigator. That's not the case. And the fact that we are appealing a decision is a right that we have. It shouldn't be limited, and it shouldn't be held against us. Courts can rule against us. That's fine.

And so that's really what the focus is here and that's why I gave the opening that I had. We are willing to be bound by applicable law. And quite frankly, the concept that the exigencies of a case allow a court to change what applicable law is is problematic. I gave the criminal example as a reason. And the reason was that, in certain instances, the

application of law may allow a criminal to go free. It's a problem with our system and how we work, but that's what the law does, and it is absolute in its application.

Let me address the so-called gatekeeper provision. The gatekeeper provision, in a certain sense, is recognized in the Barton Doctrine. It's jurisdictional, and it says, to the extent you're going to litigate with somebody who served during the bankruptcy, who was a trustee, then you have to come to the bankruptcy court and pass through a gate. It doesn't say you have to pass through a gate for a reorganized debtor who does something after a plan is confirmed and going forward. And so that's -- there's a distinction.

And if you look at Judge Summerhays' decision, which I will be happy to send to the Court, in *WRT* involving -- it's kind of (indecipherable) and Mr. Pauker, where, in that case, the trustee, the litigation trustee, spent more litigating than it had in recoveries, and Baker Hughes filed suit. Judge Summerhays said, look, the Barton Doctrine only applies to a certain extent. It is limited once you get into post-confirmation matters and related-to jurisdiction.

And so, again, the Barton Doctrine is what it stands for. We agree with it, we recognize it, and it should be applied. The Barton Doctrine, however, should not be extended, should not go past its reach, and should not go past the grant of jurisdiction for this Court.

And so you have in here, though they have -- they have tried to hide it in a limited fashion, this gatekeeper provision. The gatekeeper provision, as currently written, covers post-confirmation claims that somebody has to come before this Court to the extent there's a breach of a contract. That's not proper, and it's not covered by your post-confirmation jurisdiction. To the extent there's an interpretation of an existing contract and an interpretation of the order, you do have authority, and I don't question that.

THE COURT: But address Mr. Pomerantz's statement that there's a difference between saying you have to go to the bankruptcy court and make an argument, we have a colorable claim that we would like to pursue, and having that jurisdictional step required. There's a difference between that and the bankruptcy court adjudicating the claim.

MR. DRAPER: Well, there are two parts to that. Number one is there's an injunction in place from an action taken post-confirmation against property of the estate. We all agree at that, correct? And we believe that the injunction applies to post-confirmation action against property of the pre-confirmation estate. We all agree to that.

However, if in fact there's a breach of a contract postpetition that the parties have a dispute about, that

contract is now no longer under your purview once the contract has been assumed. And so they shouldn't have to make a colorable claim to you that a breach of the contract has occurred. That should be the determining factor for another court.

That's, in essence, what *Craig's Store* says. Your jurisdiction and the jurisdiction of a bankruptcy court is limited. It's limited by *Stern vs. Marshall*. It's limited by your ability to render findings of fact and conclusions of law versus render a final decision. That decision has been made not by us, it's been made by Congress and it's been made by the United States Constitution.

THE COURT: All right. And I think we all agree with you regarding the holding of *Craig's Stores* and some of the other post-confirmation bankruptcy subject matter jurisdiction holdings. But Mr. Pomerantz is arguing that this gatekeeping function is warranted by, among other things, you know, there was a district court holding, *Baum v. Blue Moon*, or a Fifth Circuit case, that upheld a district court having the ability to impose pre-filing injunctions in the context of a vexatious litigator. So, you know, that's a strong analogy he makes to what's sought here. What is your response to that?

MR. DRAPER: My response to that is a district court can do that. A district court has jurisdiction to make that decision. And quite frankly, a district court can sanction a

vexatious litigator under Rule 11.

So, in fact -- again, you have to bifurcate your power versus the power that a district court has. And that gatekeeper provision is allowed by a district court because they had authority over the case. You may not have authority over being the gatekeeper for a post-confirmation matter that you had no jurisdiction over to start with.

THE COURT: Okay.

MR. DRAPER: That, that's the distinction between here. That's -- what's going on here is they are -- they are mashing together a whole load of concepts under the vexatious litigator and the anti-Dondero function that fundamentally abrogate the distinction between what your jurisdiction is pre-confirmation versus your jurisdiction post-confirmation. And that --

THE COURT: Do you think --

MR. DRAPER: -- is sacrosanct.

THE COURT: Do you think Judge Lynn got it wrong in *Pilgrim's Pride*? Do you think Judge Houser got it wrong in *CHC*? Or do you think this situation is different?

MR. DRAPER: There are two parts to that. I have told Judge Lynn, since I have been working with him, that I think *Pilgrim's Pride* is wrongfully decided. However, having said that, *Pilgrim's Pride* and those cases dealt with claims against the -- the channeling injunction affected actions

during the bankruptcy. It did not serve as a post-jurisdictional grant of jurisdiction to the bankruptcy court. It did not pose as an ability -- as a limitation on a post-confirmation litigator or a post-effective date litigator to address a wrong done to them by an independent director of a general partner.

In a sense, Judge Lynn's determination, and Judge Houser, is consistent somewhat with the Barton Doctrine. Now, do I agree that they're right? No. But I understand the decision and I understand the context in which it was rendered and I don't have a huge problem with it.

So, again, let's parse what we're trying to do here. Number one, we are -- we have to bifurcate post-confirmation jurisdiction or post-effective date jurisdiction and what you can do as a post-effective date arbiter versus what you could do pre-effective date and pre-effective date claims. And again, that's the problem with what's written here. It is designed one hundred percent to expand your post-effective date jurisdiction through both the gatekeeper provision and the jurisdictional grant that's here from your pre-effective date capability, your pre-effective date jurisdiction, and your pre-effective date ability to either curb a claim or not to curb a claim. And that, that's the issue.

And again, let's start talking about the independent directors. I recognize, again, that there's an order there.

But if Mr. Seery -- let's take Mr. Seery -- is acting as a director of Strand but is also an accountant for the Debtor and makes a mistake, he would be sued in his capacity as the accountant for the Debtor, not as an independent director of Strand. That distinction needs to be made.

What we are doing here under this plan, and what's been argued by Mr. Pomerantz, is too broad a brush. It needs to be cut back. The Court needs to take a very hard look at what's being presented here.

And again, the Court's order is very clear. And this is binding. I recognize that. But the protection they got was serving as an independent director. The protection they didn't get was -- let's take Mr. Seery, if Mr. Seery was serving as an accountant and blew a tax return. Those are distinctions that warrant analysis and warrant looking at here. And again, it is too broad a brush that's touted here, and that is why this plan on its face is not confirmable with respect to both the post-confirmation jurisdiction, the gatekeeper provision, the exculpation provisions.

And so let me address a few other things, just to address them. Number one, the argument has been made with respect to the creditors and the resolicitation issue and that creditors could have come in looking, seen, followed the case, and basically calculated and made the same calculation that the Debtor made when they filed this and put forth the new plan

analysis versus liquidation analysis. And then they've also made the argument, well, nobody came and complained. Well, two parts to that.

Number one, as you know, a disclosure statement needs to be on its face and should not require a creditor to go back in and monitor the record -- and quite frankly, in this record, there are thousands of pages -- and do the calculation himself. This was incumbent upon the Debtor to possibly resolicit when these material changes took place.

Number two, the recalculation has not been subject to the entire creditor body seeing it. And anybody who wanted to call them would have had to have seen the document they filed on February 1st and made a telephone call basically contemporaneous with seeing it.

Those are two things. The argument that they didn't call me is just nonsensical. There's nobody -- you, you are sitting here -- and I've had a number of battles over the years with Judge (indecipherable), who was -- who -- and her view was, I'm here to protect the little guy who's not -- didn't hire counsel, who's not represented by Mr. Clemente and his huge clients who have voted in favor of the plan. It's the little person, *i.e.*, the employees who would vote against a plan that they so -- so desperately tried to get out from under.

THE COURT: Well, --

MR. DRAPER: It's really a function --

THE COURT: -- Mr. Pomerantz argues it's not as though there was a materially adverse change in treatment; it was the disbursement estimate. And doesn't every Chapter 11 plan -- most Chapter 11 plans, not every -- they make an estimate. I mean, and it's, frankly, it's very often a big range of recovery, right, a big range of recovery, because we don't know what the allowed claims are going to compute to at the end of the day. There's obviously liquidation of assets. We don't know. Isn't this sort of like every -- not, again, not every other plan, but most other plans -- where there's a big range of possible estimated distributions? I mean, this wasn't a change in treatment, right?

MR. DRAPER: Well, let me address that. There are two parts to that. Most plans I see that contain some sort of analysis have a range. This one doesn't have a range. What they've done is they've buried in a footnote or assumption that these numbers may change. So had they said, look, your recovery can go from 60 cents to 85 cents, God bless, they probably would have been right.

Number two, which is more problematic to me, to be honest with you, is the fact that, number one, the operating expenses have increased over a hundred percent. And number two, the Debtor has made a determination post-disclosure statement and pre-hearing that they're going to change their model of

business.

The original disclosure statement said we're not going to get into the managing CLO part of the business and we're going to let these contracts go. However, at some point along the way, they made a change. I don't know to this day, because I was never furnished the backup to the expense side. I understand what they said why they didn't give me the asset side, but the expense side, they should have given me, and I did ask for.

But, you know, what we have now is a more fundamental problem with the execution of the plan and the expectation that creditors -- what they're going to get, because, in fact, the expense items have doubled.

I think creditors were entitled to know that, rather than it having been sprung upon everybody, when I got it the day before a deposition. And so those are things that I think warranted a change in solicitation. Now, the result may have been the same. I don't know. More people may have voted against the plan. More people may have opted in from Class 8 to Class 7, I mean, based upon that information. That information was not provided to them.

And so I look at two -- three things. One is a range could have been given, and they probably would have been a whole lot better off. Two, you have a material change in expenses. And three, you have a material change in business

model. Three things that occurred between November and this confirmation hearing. Three things that were not known by the creditor body and not told to them.

THE COURT: Mr. Draper, I --

MR. DRAPER: Now, it may have been told --

THE COURT: I don't want to belabor this any more than I think we need to, but I've got a Creditors' Committee with very sophisticated professionals, very sophisticated members. They're fiduciaries to this constituency. You know, you mentioned the little guy. I'm not quite sure who is the little guy in this case. I think it's a case of all big guys. But, I mean, they're fine with what's happened here. Meanwhile, you -- I mean, clarify your standing here for Dugaboy and Get Good. I mean, --

MR. DRAPER: I have --

THE COURT: -- I know you have standing. Mr. Pomerantz did not say you don't have standing. But in pointing out the economic interests here, I think he said your clients only have asserted a postpetition administrative expense. Is that correct?

MR. DRAPER: No. I have a post -- I have an -- I have a claim that's been objected to. I don't think my economic --

THE COURT: A claim of what amount?

MR. DRAPER: I think it's $10 million. But Mr.

Pomerantz is right, it requires a looking through the -- through the entity that I had a loan relationship with.

I recognize all of those things. I don't think that's relevant to whether my argument is correct or incorrect. I have standing to do it. I don't think whether my claim is 50 cents or $50 million should change the Court's view of whether the claim is good or bad.

THE COURT: Well, I do want to understand, though. Okay. So you have not asserted an administrative expense, correct?

MR. DRAPER: No. There's been an administrative expense that's been asserted, --

THE COURT: For what?

MR. DRAPER: -- but that --

THE COURT: For what?

MR. DRAPER: I don't have the number in front of me, Your Honor. I don't -- I don't have those numbers --

THE COURT: Okay. Well, then, --

MR. DRAPER: -- in front of me. I have asserted --

THE COURT: -- what is the concept? What is the basis for it?

MR. DRAPER: It deals with -- Mr. Pomerantz is absolutely right as to how he's articulated it.

THE COURT: I can't remember what he said.

MR. DRAPER: It deals with -- it deals with a

transaction that's unrelated to the Debtor that deals with Multi-Strat. I agree with that.

THE COURT: Okay. So I remember him saying piercing the corporate veil. Your trusts -- both of them, one of them, I don't know -- engaged in a transaction with Multi-Strat that you say --

MR. DRAPER: No, that --

THE COURT: -- gave -- okay. Well, you say Multi-Strat is liable and the Debtor is also liable?

MR. DRAPER: No. Let me make two things. The administrative claim deals with a Multi-Strat transaction that took place during the bankruptcy. My unsecured claim deals with a transaction that took place prior to the bankruptcy, where we lent money to another entity that then funneled money out into the Debtor. We're -- our contention is that the Debtor is liable for that loan.

THE COURT: All right. So both the administrative expense as well as the prepetition claim require veil-piercing to establish liability of the Debtor?

MR. DRAPER: Or single business enterprise. I don't necessarily have to veil-pierce.

THE COURT: Okay. I'm not even sure that single business enterprise is completely available anymore in Texas, by the Texas legislature doing different things, assuming Texas law applies. I don't know, maybe Delaware does. But I

-- sorry. Just let me let that sink in a little bit. You're -- okay. Okay. Let me let it --

MR. DRAPER: Your Honor, I --

THE COURT: -- sink in a little bit.

MR. DRAPER: Okay.

THE COURT: These trusts -- of which Mr. Dondero is the beneficiary ultimately, right?

MR. DRAPER: Yes. Well, and to --

THE COURT: So, your --

MR. DRAPER: Again, I have not gone up --

THE COURT: The beneficiary of your client --

MR. DRAPER: Mr. Dondero is --

THE COURT: The beneficiary of your client is ultimately hoping to succeed on the administrative expense and the claim on the basis that you should disregard the separateness of Highland and these other entities?

MR. DRAPER: Well, let's take the --

THE COURT: When he's resisted that --

MR. DRAPER: -- unsecured claim. The --

THE COURT: -- in multiple pieces of litigation? Right? I'm sorry. I'm just trying to let this sink in. Okay. If you could elaborate. I'm sorry. I'm talking too much. You answer me.

MR. DRAPER: Okay. What we are saying is that, in essence, the party we lent the money to was a conduit for the

Debtor.

THE COURT: Okay. And who was that entity that either --

MR. DRAPER: Highland Select.

THE COURT: -- Dugaboy or Get Good lent money to?

MR. DRAPER: The Get Good claim is completely different. The Get Good claim is written as a tax claim. Honestly, I haven't taken a hard look at it. I will, once we get through this, and it may be withdrawn. The Dugaboy claim is a claim that arises through a conduit loan.

THE COURT: Okay. But to which entity?

MR. DRAPER: Highland Select.

THE COURT: Okay. All right. Well, continue with your argument. I'll get my flow chart out and --

MR. DRAPER: Well, let me -- again, I think I've made the points that I needed to make. I think I've done it in a sense that you -- what I think the Court needs to do is take a very hard look at the jurisdictional extension that's being granted here. I think the exculpation provision, in and of itself, just by the mere inclusion of Pachulski and the Debtor's professionals and the Committee professionals, is just unconfirmable. It has to be stricken.

And I think the injunction and the juris... the gatekeeper provision are not allowed by applicable law. If this plan merely said, we will enforce the Barton Doctrine, we will

abide -- and this order the Court has entered stands, the injunction that's provided and the rights that we have under 1141 stand, nobody would be objecting. That's why the U.S. Trustee has objected, because of the expansive nature of what the -- what's been done in this plan.

And with that, I'll turn it over to Mr. Taylor or Davor.

THE COURT: All right. Who's next?

MR. RUKAVINA: Your Honor, Davor Rukavina. Can you hear me?

THE COURT: I can.

CLOSING ARGUMENT ON BEHALF OF CERTAIN FUNDS AND ADVISORS

MR. RUKAVINA: Your Honor, thank you. I'll try not to repeat the arguments from Mr. Draper, but I do want to point out a couple bigger-picture issues, I think.

One, the issue today is not Mr. Dondero, what he has been alleged to have done, what he is alleged to do in the future. The Debtor has gone out of its way to create the impression that we're all tentacles, we're vexatious litigants, we're frivolous litigants. The issue today is whether this plan is confirmable under 1129(a) and 1129(b). And I think that that has to be the focus.

Nor is the issue, I think, today any motivation behind my objection or Mr. Draper's or anything else.

And I do take issue that my motivation or my client's motivation has some ulterior motive for a competing plan or

burning down the house or anything like that. It's very, very simple. My clients do not want $140 million of their money and their investors' money, to whom they owe fiduciary duties, to be managed by a liquidating debtor under new management without proper staffing and with an obvious conflict of interest in the form of Mr. Seery wearing two hats.

I respect very much that Mr. Seery wants to monetize estate assets for the benefit of the estate creditors. That's his job. That's incompatible with his job under the Advisers Act and, as he said, to maximize value to my clients and over a billion dollars of investments in these CLOs.

That should not be, Your Honor, a controversial proposition. I should not be described as a tentacle or vexatious because my clients don't want their money managed by someone that they, in effect, did not contract with. I may be -- I may lose that argument. The CLOs have obviously consented to the assumption. But my argument should not be controversial. It should not be painted with a broad brush of somehow being done in bad faith by Mr. Dondero.

And in fact, Mr. Seery has admitted that the Debtor and he are fiduciaries to us. The fact that today they call us things like tentacles and serial litigants and vexatious litigants -- we all know what a vexatious litigant is. We've all dealt with those. The fact that our fiduciary would call us that just reconfirms that it should have no business

managing our or other people's money.

And then for what? Mr. Seery has basically said that the Debtor will make some $8.5 million in revenue from these contracts, net out $4 million of expenses. That's net profit of $4.5 million. But then they have to pay $3.5 million for D&O insurance and $525,000 in cure claims. But it's the Debtor's business decision, not ours.

Your Honor, the second issue is the cram-down of Class 8. There are two problems here: the disparate treatment between Class 7 and Class 8, which also raises classification, and then the absolute priority rule. Class 7 is a convenience class claim -- is a convenience claim, Your Honor, with a $1 million threshold. Objectively, that is not for administrative convenience, as the Code allows. And the only evidence as to how that million dollars was arrived at was, oh, it was a negotiation of the Committee.

There is no evidence justifying administrative convenience. Therefore, there is no evidence justifying separate classification. And on cram-down, the treatment has to be fair and equitable, which *per se* it is not if there is unfair discrimination. And there is unfair discrimination, because Class 8 will be paid less.

On the absolute priority rule, Your Honor, I think that it's very simple. I think that the Code is very clear that equity cannot retain anything -- I'm sorry, equity cannot

retain any property or be given any property. Property is the key word in 1129(b), not value. It doesn't matter that this property may not have any value, although Mr. Seery said that it might. What matters is whether these unvested contingent interests in the trust are property. And Your Honor, they are property. They have to be property. They are trust interests.

So the absolute priority rule is violated on its face. There is no evidence that unsecured creditors in Class 8 will receive hundred-cent dollars. The only evidence is that they'll receive 71 cents. Mr. Seery said there's a potential upside from litigation. He never quantified that upside. And there is zero evidence that Class 8 creditors are likely to be paid hundred-cent dollars. So, again, you have the absolute priority rule issue.

And this construct where, okay, well, equity won't be in the money unless everyone higher above is paid in full, that is just a way to try to get around the dictate of the absolute priority rule. If that logic flies, then the next time I have a hotel client or a Chapter 11 debtor-in-possession client where my equity wants to retain ownership, I'll just create something like, well, here's a trust, creditors own the trust, I won't distribute any money to equity, and equity can just stay in control.

The point again is that this is property and it's being

received on account of prepetition equity.

And there's also the control issue. The absolute priority rule, the Supreme Court is clear that control of the post-confirmation equity is also subject to the absolute priority rule. Here you have the same prepetition management postpetition controlling the Debtor and the assets.

Your Honor, the Rule 2015.3 issue, someone's going to say that it's trivial. Someone's going to accuse me of pulling out nothing to make something. Your Honor, it's not trivial. That's part of the problem in this case, that this Debtor owns other entities that own assets, and there's been precious little window given into that during the case, during this confirmation hearing, and in the disclosure statement.

Rule 2015.3 is mandatory. It's a shall. I respect very much Mr. Seery's explanation that there was a lot going on with the COVID and with everything and that it just fell through the cracks. That's an honest explanation. But the Rule has not been complied with. And 1107(a) requires that the debtor-in-possession comply with a trustee's duties under 704(a)(8). Those duties include filing reports required by the Rules.

So we have an 1129(a)(3) problem, Your Honor, because this plan proponent has not complied with Chapter 11 and Title 11. I'll leave it at that, because I suspect, again, someone will accuse me of being trivial on that. It is not trivial. It is

a very important rule.

On the releases and exculpations, Your Honor, I'm not going to try -- I'm not going to hopefully repeat Mr. Draper. But there's a couple of huge things here with this exculpation that takes it outside of any possible universe of *Pacific Lumber*.

First, you have a nondebtor entity that is being exculpated. I understand the proposition that, during a bankruptcy case, the professionals of a bankruptcy case might be afforded some protection. I understand that proposition. But here you have Strand and its board that's a nondebtor.

The other thing you have that takes this outside of any plausible case law is that the Debtor is exculpated from business decisions, including post-confirmation. I understand that professionals in a case make decisions, and professionals, at the end of the case, especially if the Court is making findings about a plan's good faith, that professionals making decisions on how to administer an estate ought to have some protection.

That does not hold true for whether a debtor and its professionals should have protection for how they manage their business. GM cannot be exculpated for having manufactured a defective product and sold it during its bankruptcy case.

Here, I asked Mr. Seery whether this language in these provisions, talking about whether the administration of the

estate and the implementation of the plan includes the Debtor's management of those contracts and funds. He said yes. He said yes. So if you look at the exculpation provision, it is not limited in time. It affects, Your Honor, I'm quoting, it affects the implementation of the plan. That's going forward.

So you are exculpating the Debtor and its professionals from business decisions, including post-confirmation, from negligence. Well, isn't negligence the number one protection that people that have invested a billion dollars with the Debtor have? It's cold comfort to hear, well, you can come after us for gross negligence or theft. I get that. What about negligence? Isn't that what professionals do? Isn't that why professionals have insurance, liability insurance? It's called professional negligence for malpractice.

So this exculpation, let there be no mistake -- I heard Your Honor's view and discussion -- this is a different universe, both in space and in time.

And we don't have to worry about *Pacific Lumber* too much because we have the *Dropbox* opinion in *Thru, Inc.* We have that opinion. Whether it's sound law or not, I don't wear the robe. But the exculpation provision in that case was virtually identical. And Your Honor, that's a 2018 U.S. Dist. LEXIS 179769. In that opinion, Judge Fish -- I don't think anyone could say that Judge Fish was not a very experienced

district court judge -- Judge Fish found that the exculpation violated Fifth Circuit precedent. That exculpation covered the debtor's attorneys, the debtor, the very people that Mr. Pomerantz is now saying, well, maybe the Fifth Circuit would allow an exculpation for.

THE COURT: Well, I think he is relying heavily on the analogy of independent directors to Creditors' Committee members, saying that's a different animal, if you will, than prepetition officers and directors. And he thinks, given the little bit of policy analysis put out there by the Fifth Circuit, they might agree that that's analogous and worthy of an exculpation.

MR. RUKAVINA: And they might. And they might. And again, I usually do debtor cases. You know that. I'd love to be exculpated.

THE COURT: But --

MR. RUKAVINA: And I think, again, I do -- I do --

THE COURT: -- I really want people to give me their best argument of why, you know, that's just flat wrong. And Mr. Draper just said it's, you know, there's a categorical --

MR. RUKAVINA: Yeah.

THE COURT: -- rejection of exculpations except for Committee members and Committee in *Pacific Lumber*. And I'm scratching my head on that one. And partly the reason I am, while 524(e) was thrown out there, the fact is there's nothing

explicitly in the Bankruptcy Code, right, that explicitly permits exculpation to a Committee or Committee members. There's just sort of this notion, you know, allegedly embodied in 1103(c), or maybe there are cases you want to cite to me, that they're fiduciaries, they're voluntary fiduciaries, they ought to have qualified immunity.

And again, I see it as more of a policy rationale the Fifth Circuit gave than pointing to a certain statute. So if it's really a policy rationale, then I think the analogy given here to a newly-appointed independent board is pretty darn good.

So tell me why I'm all wrong, why Mr. Pomerantz is all wrong.

MR. RUKAVINA: I am not going to tell you that you're all wrong. I'm not going to tell Mr. Pomerantz that he's all wrong. Although I am, I guess, a Dondero tentacle, I am not a Mr. Draper tentacle, and I happen to disagree with him. That's my right. I respect the man very much. I thought he did a very honorable and ethical job explaining his position to Your Honor. I believe that the Fifth Circuit would approve exculpations for postpetition pre-confirmation matters taken by estate fiduciaries. I do believe that they would. And I do believe that that should be the case.

But again, I'm telling you that this one is different. It's -- Mr. Pomerantz is misdirecting you. The estate

professionals manage the estate. The Debtor manages its business. It goes out into the world and it manages business. And as Your Honor knows, under that 1969 Supreme Court case, of course I blanked, and under 28 U.S. 959, a debtor must comply, when it's out there, with all applicable law.

So if the Debtor -- and I'm making this up, okay? I am making this up. I'm not alleging anything. But if the Debtor, through actionable neglect, lost $500 million of its clients' or its investor clients' money, I'm telling you that under no theory can that be exculpated, and I'm telling you that that's what this provision does.

The estate and the Debtor can release their claims. It happens all the time. Whatever -- whatever claims the estate may have against professionals, those can be released. It's a 9019. I'm not complaining about that. Although I do think that it's premature in this case, because we don't know whether there's any liability for the $100 million that Mr. Seery told you Mr. Dondero lost. But in no event can business -- business --

THE COURT: I don't understand what you just said.

MR. RUKAVINA: Your Honor, I --

THE COURT: Mr. Dondero is not released --

MR. RUKAVINA: -- went through Mr. Seery's --

THE COURT: -- by the estate.

MR. RUKAVINA: I understand. I understand. But we

all have to also understand that a board of directors and officers can be liable, breaches of fiduciary duty by not properly managing an employee. So I'm not suggesting -- I mean, I know that there's been an examiner motion filed. I'm not suggesting that we have a mini-trial. I'm not suggesting there's actionable conduct. What I'm telling you is that the evidence shows that there's a large postpetition loss. And it's premature to prevent third parties that might have claims from bringing those.

And then I think -- I'm not sure that Your Honor understood my point. Let me try to make it again. This exculpation is not limited in time. This exculpation is expressly not limited in time and applies to the administration of the plan post-confirmation. I don't think under any theory would the Fifth Circuit or any court at the appellate level allow an exculpation for purely post-reorganization post-bankruptcy matters. I have nothing more to tell Your Honor on exculpation.

THE COURT: Well, again, I -- perhaps I go down some roads I really don't need to go down here, but I'm not sure I read it the way you did. I thought we were just talking about pre -- postpetition, pre-confirmation. Or pre-effective date.

MR. RUKAVINA: Your Honor, Page --

THE COURT: The --

MR. RUKAVINA: Page 48 of the plan, Section C,

Exculpation. Romanette (iv). The implementation of the plan. And I -- and that's -- that's part of why I asked Mr. Seery that yesterday. Does the implementation of the plan, in his understanding, include the Reorganized Debtor's management and wind-down of the Funds, and he said yes.

THE COURT: Okay.

MR. RUKAVINA: So that's right there in black and white.

It also includes the administration of the Chapter 11 case. If that is defined broadly, as Mr. Seery wants it to be, to define business decisions, then that also exceeds any permissible exculpation.

So, again, I'm telling Your Honor, with due respect to you and to Mr. Pomerantz, that the focus of Your Honor's questioning is wrong. The focus of Your Honor's questioning should be on exculpation from what? From business -- *i.e.*, GM manufacturing and selling the car -- or from management of the bankruptcy case? Management of the bankruptcy case? Okay. Postpetition pre-confirmation managing business, never okay.

Your Honor, on the channeling -- and let me add, I think it's very clear, there is no Barton Doctrine here. This is not a Chapter 11 trustee. The Barton Doctrine does not extend to debtors-in-possession. And I can cite you to a recent case, *In re Zaman*, 2020 Bankr. LEXIS 2361, that confirms that the Barton Doctrine does not apply to a debtor-

in-possession.

I want to --

THE COURT: Remind me of that --

MR. RUKAVINA: -- discuss, Your Honor, the --

THE COURT: Remind me of the facts of that case. I feel like I read it, but -- or saw it in the advance sheets, maybe.

MR. RUKAVINA: I honestly do not recall. I read it a few days ago, and since then, I hope Your Honor can appreciate, I've been up very late trying to negotiate something good in this case.

THE COURT: I'd like to know --

MR. RUKAVINA: So, I mean, I have the case in front of me.

THE COURT: I'd like to know about a holding that says Barton Doctrine can't be applied in a Chapter 11 post-confirmation context, if that's --

MR. RUKAVINA: Well, I have it --

THE COURT: -- indeed the holding.

MR. RUKAVINA: I have it right in front of me here, Your Honor, and I can certainly -- all I know is that this case held that -- it rejected the notion that the Barton Doctrine applies to a debtor-in-possession.

THE COURT: Okay.

MR. RUKAVINA: And maybe --

THE COURT: That --

MR. RUKAVINA: There it is, right there.

THE COURT: What judge?

MR. RUKAVINA: Your Honor, it is the Southern District of Florida, and it is the Honorable -- Your Honor, it is the Honorable Mindy Mora.

THE COURT: Okay.

MR. RUKAVINA: M-O-R-A.

THE COURT: Okay.

MR. RUKAVINA: I have not had the pleasure of being in front of that judge.

Your Honor, let me discuss the channeling injunction. This is the big one for me. This is the big one. And I think we have to begin -- and it's the big one, as I'll get to, because Your Honor knows that the CLO management agreements give my clients certain rights, and this injunction would prevent those rights from being exercised post-confirmation. It's not dissimilar from the PI hearing that we're in the middle of in an adversary.

But I begin my analysis, again, with 28 U.S.C. 959. Your Honor, that -- the first sentence of that statute makes it very clear that when it comes to carrying on a business, a debtor-in-possession may be sued without leave of the court appointing them.

So the first thing that this channel -- gatekeeper,

channeling, I don't mean to miscall it -- the first thing that this gatekeeping injunction does is it stands directly opposite to 28 U.S.C. 959.

28 U.S.C. 959 also says that jury rights must be preserved. As I'll argue in a moment, this injunction also affects those rights.

In addition to 959, we have the fundamental issue of post-confirmation jurisdiction. As Mr. Draper said, here, this channeling injunction applies to post-confirmation matters. Similar to my answer to you on exculpation, I can see there being a place for a channeling injunction during the pendency of a case or for claims that might have arisen during the pendency of a case. I cannot see that, and I don't know of any court that, at least at a circuit level, that would agree that this can apply post-confirmation.

It is, again, the equivalent of GM manufacturing a car post-confirmation and having to go to bankruptcy court because someone's wanting to sue it for product negligence or liability. It's unthinkable. The reason why a debtor exits bankruptcy is to go back out into the community. It's no longer under the protection of the bankruptcy court. That's what the media calls Chapter 11, it calls it the protection of the court. There's no such protection post-reorganization. So, --

THE COURT: Is that really analogous, Mr. Rukavina?

Let's get real. Is this really analogous --

MR. RUKAVINA: It is.

THE COURT: -- to GM --

MR. RUKAVINA: It is.

THE COURT: -- manufacturing thousands of cars?

MR. RUKAVINA: It absolutely is analogous. Because this Debtor is going to assume these contracts and it is going to go out there and it is going to make daily decisions affecting a billion dollars of other people's money. Each of those decisions hopefully will be done correctly and make everyone a lot of money, but each of those decisions is the potential for claims and causes of action.

So it is analogous, Your Honor. They want my clients and others to come to you for purely post-confirmation matters. The Court will not have that jurisdiction. There will be no bankruptcy estate, nor can the Court's limited jurisdiction to ensure the implementation of the plan go to and affect a post-confirmation business decision.

That's the distinction. The Debtor's post-confirmation business is not the implementation of a plan. As Mr. Draper said, there's a new entity. There's a new general partner. There's a new structure. Go out there and do business, Debtor. That's what they're telling you. They're telling you this is not a liquidation because they're going to be in business. Okay. Well, the consequence of that is that

there's no post-confirmation jurisdiction.

Now, Mr. Pomerantz says, and I think you asked Mr. Draper, well, the jurisdiction to adjudicate whether something is colorable is different from the jurisdiction to adjudicate the underlying matter. Your Honor, I don't understand that argument, and I don't see a distinction. If the Court has no jurisdiction to decide the underlying matter, then how can the Court have any jurisdiction to pass on any aspect of that underlying matter?

And whether something is colorable is a fundamental issue in every matter. That's the thing that courts look at in a 12(b)(6), in a Rule 11 issue, in a 1927 issue. So they're going to come -- or someone is going to have to come to Your Honor and present evidence and law that something is colorable. Let's say that we've said there's a breach of contract. Aren't we going to have to show you, here's the contract, here's the language, here's the facts giving rise to the breach, here's the elements? And Your Honor is going to have to pass on that. And if Your Honor decides that something is not colorable, then there ain't no step two.

And if Your Honor decides that something is colorable, then isn't that going to be binding on the future proceeding? And if it's going to be binding on the future proceeding, then of course you're exercising jurisdiction to adjudicate an aspect of that lawsuit.

I don't think that that -- I don't know I can be clearer than that, Your Honor, unless the Debtor has some other understanding of what a colorable claim or cause of action is that I'm misunderstanding.

And Your Honor, I would ask, when Your Honor is in chambers, to look at one of these CLO management agreements. I'm sure Your Honor has already. I just pulled one out of the Debtor's exhibits, Exhibit J as in Jason. And Section 14, 14 talks about termination for cause. Most of these contracts are for cause. So, Your Honor, cause includes willfully breaching the agreement or violating the law, cause includes fraud, cause includes a criminal matter, such as indictment.

So let's imagine, Your Honor, that I come to you a year from now and I say, I would like to terminate this agreement because I don't want the Debtor managing my $140 million because of one of these causes. What am I going to argue to Your Honor? I'm going to argue to Your Honor that those causes exist. And Your Honor is going to have to pass on that.

And if Your Honor says they don't exist, again, I'm done. I just got an effective final ruling from a federal judge that my claim is without merit. I'm done. Your Honor has decided the matter effectively, legally, and finally.

That's why, when Mr. Pomerantz says that the jurisdiction to adjudicate the colorableness of a claim is different from

adjudicating that claim, it's not correct. They're part of the same thing, Your Honor.

We strenuously object to that injunction, we think it's unprecedented, and we strenuously object to that injunction because we are not Mr. Dondero.

I understand the January 9th order. I'll let Mr. Dondero's counsel talk about why that was never intended to be a perpetual order. I'll let Mr. Dondero's counsel argue as to why the extension of that order *ad infinitum* in the plan is illegal.

But even if Mr. Dondero is enjoined in perpetuity from causing the related parties to terminate these agreements, Your Honor, the related parties themselves are not subject to that injunction. That's why you have the preliminary injunction proceeding impending in front of you on ridiculous allegations of tortious interference.

So whether the Court enjoins Mr. Dondero or not in perpetuity is a separate matter. The question is, as you've heard, at least my retail clients, they have boards. Those boards are the final decision-makers. Mr. Dondero is not on those boards.

In other words, it is wrong to conclude *a priori* that anything that my clients do has to be at the direction of Mr. Dondero. There is no evidence of that. The evidence is to the contrary.

Yes, a couple of my clients, the Advisors are controlled by Mr. Dondero. Mr. Norris testified to that. You'll not find Mr. Norris anywhere testifying in that transcript that Your Honor allowed into evidence that the funds, my retail fund clients are controlled by Mr. Dondero. You won't find that evidence. There was no evidence yesterday or today that Mr. Dondero controls those retail funds. The only evidence is that they have independent boards.

So I ask the Court to see that it's a little bit of a sleight of hand by the Debtor. If I am to be enjoined or if I am to have to come to Your Honor in the future as a vexatious litigant or a tentacle or a frivolous litigant, whatever else I've been called today, then let it be because of something that I've done or failed to do, something that my client has done to warrant such a serious remedy, not something that Mr. Dondero is alleged to have done.

And what have my clients done, Your Honor? What have we done to be called vexatious litigants and serial litigants? We've done nothing in this case, pretty much, until December 16th, when we filed a motion that was a poor motion, unfortunately, the Court found it to be frivolous, and the Court read us the riot act.

We refused, on December 22nd, we, my clients' employees, to execute two trades that Mr. Dondero wanted us to execute. We had no obligation to execute them. We knew nothing about

them. And Mr. Seery -- I'm sorry. Not Mr. Dondero, that Mr. Seery wanted to execute. And Mr. Seery closed those transactions that same day. And then a professional lawyer at K&L Gates, a seasoned bankruptcy lawyer, sent three letters to a seasoned professional lawyer at Pachulski, and the letters were basically ignored.

Okay. Those are the things that we've done. Other than that, we've defended ourselves against a TRO, we've defended ourselves against a preliminary injunction, we will continue to defend ourselves against a preliminary injunction, and we defend ourselves against this plan because it takes away our rights. Is that vexatious litigation? Is that, other than the frivolous motion, is that frivolous litigation?

And we heard you loud and clear when you read us the riot act on December 16th. And I will challenge any of these colleagues here today to point me to something that we have filed since then that is in any way, shape, or form arguably meritless.

So where is the evidence that my retail funds are tentacles or vexatious litigants or anything else? There is no evidence, Your Honor, and the Debtor is doing its best to give you smoke and mirrors to just make that mental jump from Mr. Dondero to my clients, effectively an alter ego, without a trial on alter ego.

Once these contracts are assumed, the Debtor must live

with their consequences. It's as simple as that. Your Honor has so held. Your Honor has so held forcefully in the *Texas Ballpark* case. And the Court, I submit respectfully, cannot excise by an injunction a provision of a contract.

Also, this injunction will -- is a permanent injunction. We know from *Zale* and other cases the Fifth Circuit does permit certain limited plan injunctions that are temporary in hundred-cent plans. This is a permanent one. It doesn't even pretend to be a temporary one.

It's also a permanent one because the Debtor knows and I think the Debtor is banking on me being unable to get relief in the Fifth Circuit before Mr. Seery is finished liquidating these CLOs.

So what we are talking about today is effectively excising valuable and important negotiated provisions of these contracts, provisions that, although my clients are not counterparties to these contracts, you've heard from at least three of them we do control the requisite vote, the voting percentages, to cause a termination, to remove the Debtor, or to seek to enforce the Debtor's obligations under those contracts.

And again, Your Honor, it's very simple. Where those contracts require cause, there either is cause or is not cause. If there is not cause, the Debtor has its remedies. If there is cause, I'll have my remedies. But it's not for

this Court post-confirmation to be making that determination. That's not my decision. That's Congress's decision.

So, Your Honor, for those reasons, we object, and we continue to object, and we'd ask that the Court not confirm this plan because it is patently unconfirmable. Or if the Court does confirm the plan, that it excise those provisions of the releases, exculpations, and injunction that I just mentioned as being not in line with the Fifth Circuit or Supreme Court precedent.

Thank you.

THE COURT: All right. Can I -- I meant to ask Mr. Draper this. Can we all agree that we do not have third-party releases *per se* in this plan? Can we all agree on that?

MR. DRAPER: I don't know. I have to look at that. I think what you have are exculpations and channeling injunctions for third parties who have not paid for those channeling injunctions or those exculpations.

THE COURT: All right.

MR. RUKAVINA: Your Honor, was that question -- was that question solely to Mr. Draper?

THE COURT: Well, no, it was to all of you. I thought we could all agree that we don't have third party releases *per se*. Okay. There was --

MR. RUKAVINA: Your Honor, we --

THE COURT: -- a little bit of glossing over that in

some of the briefing, I can't remember whose. But we have Debtor releases, we have --

MR. RUKAVINA: Yes.

THE COURT: -- exculpations that deal with postpetition negligence only, we have injunctions, which I guess the Debtor would say merely serve to implement the plan provisions and are commonplace, but Mr. Draper would say maybe are tantamount to third-party releases. Is that --

MR. RUKAVINA: Your Honor, I don't think --

THE COURT: -- where we are?

MR. RUKAVINA: -- there's any question -- I don't think there's any question that the exculpation is a third-party release, and that that's also what Judge Fish held in the *Dropbox* case. It says that none of the exculpated parties shall have any liability on any claim. So, --

THE COURT: All right.

MR. RUKAVINA: -- that necessarily --

THE COURT: I get what you're saying, but I just think, in common bankruptcy lingo, most people regard a third-party release as when third parties are releasing -- third parties meaning, for example, creditors, interest holders -- are releasing officers and directors and other third parties for anything and everything.

Exculpation, I get it, it's worded in a passive voice, but it is third parties releasing third parties, but for a narrow

thing, postpetition conduct that is negligent. Okay. So I think -- while there's technically something like a third-party release there, it's not in bankruptcy lingo what we call a third-party release. It's an exculpation means no liability of the exculpated parties for postpetition conduct that's negligent. So I -- anyway, I think we all agree that, I mean, can we all agree there aren't any *per se* third-party releases as that term is typically used in bankruptcy parlance?

MR. RUKAVINA: I apologize, Your Honor, and I'm not trying to try your patience, but I cannot agree to that. Whatever claims my client, a nondebtor, has against Strand, a nondebtor, are gone. Whether it's a release or exculpations, they're gone. So I apologize, I cannot agree to that, Your Honor.

MR. DRAPER: Your Honor, this is Douglas Draper. I can't agree, either. I think it's definitional. And quite frankly, I think I'm looking at the functional effect of what's here, and they appear to be third-party releases.

THE COURT: Okay. All right. Who is making the argument for Mr. Dondero?

MR. TAYLOR: Your Honor, Clay Taylor appearing on behalf of Mr. Dondero.

THE COURT: Okay.

CLOSING ARGUMENT ON BEHALF OF JAMES D. DONDERO

MR. TAYLOR: Your Honor, first of all, as this Court

is well aware, this Court sits, as a bankruptcy court, as a court of equity. It has many different tools available to it. One of those, of course, is denying confirmation of this plan because of the laws that we have discussed today and that we believe the evidence has shown, and I won't go into those. Of course, of course, Your Honor could confirm that plan. Yet another tool available to this Court is it can take it under advisement.

To the extent that this Court decides to confirm this plan and decides to confirm it today, it certainly takes a lot of options off the table for all parties. There are ongoing discussions, I'm not going to go into any of the particulars of those discussions, but a ruling on confirmation today would effectively end that, because, absent, then, an order vacating confirmation, there's a lot of eggs that can't become unscrambled after a confirmation order is entered.

So we would respectively ask that, to the extent that the Court is even considering confirmation, we don't believe it to be appropriate, but at least take it under advisement for 30 days, or at least, in the very alternative, that it announce some date which it is going to give a ruling, so that we kind of know when that is going to come down, to see if any positive ongoing discussions can result in more of a global resolution that all parties can agree upon.

Addressing more the merits of the case, Your Honor, Mr.

Dondero does indeed object to the nondebtor releases, the exculpations, the injunction. I believe those have been covered rather extensively in the prior argument, so I wasn't going to go into those here because they've been addressed. Of course, I will endeavor to answer any questions that Your Honor may have on those.

I will say I think Your Honor asked for everybody's best shot as to why this is different for a Committee member versus the independent trustees here. I will say my best shot is, first of all, *Pacific Lumber* says what it says. I believe Mr. Pomerantz has indicated their position that that language is dicta and therefore not binding upon this Court. I respectfully disagree with that. But to the extent, more directly answering Your Honor's question, to me, the difference is clear. Chapter 7 trustees are a creature of statute. So are Chapter 11 trustees. And -- as are members of a Committee that are seated pursuant to the Bankruptcy Code. Those are all creatures of statute. And the independent board of trustees, while there are certainly -- there are some analogies that can be made, undoubtedly, but they are not a creature of statute. There is no provision for them under the Bankruptcy Code. And therefore I don't believe that they should and can receive the same protections under *Pacific Lumber*.

And so hopefully that -- that is my best shot at

answering, directly answering the question that Your Honor posed.

THE COURT: Okay.

MR. DRAPER: Mr. Dondero also has issue with the overbroad continuing jurisdiction of this Court. I believe Mr. Rukavina has stated that rather succinctly, too. Merely ruling upon whatever claim is colorable or not certainly has definite impacts. If this Court has jurisdiction to do that when it otherwise wouldn't have jurisdiction, it enacts an expansion, a potentially impermissible expansion of this Court's jurisdiction. And for that reason, the plan should -- confirmation should be denied.

Getting into the particulars of 1129, Your Honor, there is problems under 1129(a)(2). Those are the solicitation problems. Let's just kind of look at what the evidence showed. On November 28th, there was a disclosure statement, it was published to all creditors, and it said, under this plan, you're going to get 87 cents. It wasn't a range. Now, there was some assumptions that went in there, but they said, under a liquidation of all these assets, you're going to get 62 cents.

The Debtors came back approximately two months later, on January 28th, and said, oh, wait, we missed the boat here, and actually, under the plan, you're going to get 61 cents. And under a liquidation, though, you'd only get 48.

Well, the problem is, already, two months later, they've already told you they missed the boat on what the liquidation analysis was just two months ago. And two months ago, they told you under a liquidation you'd get 62 cents, and now we're telling you you're going to get less. That's at least some very good evidence that the best interests of the creditors isn't being met, and potentially a liquidation is much better.

They then came back, potentially maybe realizing that problem, also because some new information came in with the employees, and also with UBS, which adjusted the overall general unsecured claims pool, and said, well, under the plan you're going to get 71 cents, and under a liquidation you're going to get 55 cents.

In between those iterations from November to February, they found $67 million more in assets. So Mr. Seery testified he believed some of that's as to market increases in values, and some (garbling) investment, market -- securities. And some were just in these private equity investments.

There are indeed some rollups behind all of these numbers. I do understand why they wouldn't want to make some of these numbers public, because they might not be able to get -- create the upside for any particular asset class that they're seeking to monetize.

However, we and others, including Mr. Draper, asked for those rollups to be provided, and we certainly could have

taken those under seal or a confidentiality agreement, could have also put those before this Court under seal and the Debtor could have put those rollups before this Court under seal. It elected not to do so.

So, rather, what you have is the naked assumptions of this is what we think we can monetize the assets, or we're not going to tell you what it is, but trust me, Creditors, and cool, we found $67 million worth of value in the past two months, so therefore we're going to beat the liquidation analysis that we previously told you just two months ago.

They also acknowledge that, in those two months, that there was going to be about $26 million in increased costs from their November analysis to their February analysis. And they included that in their projections.

Finally, they acknowledged, in those two months, that we had previously estimated -- and they even have it in their assumptions in November liquidation and plan analysis -- that UBS, HarbourVest, and I believe it was Acis, were all going to be valued at zero dollars, and that's what the claims were going to be. Well, they kind of missed the boat on those, and they missed it by a lot. They -- it increased all the claims in the pool from $195 million to $273 million, or sorry, I don't -- look at that again, but it was an increase of $95 million. I'm sorry, 190 -- the claims pool increased from $194 million to -- I'm sorry, Your Honor, I have too many

papers in front of me -- on November, the claims pool was 176 and it increased by February 1st to 273. Therefore, approximately $95, almost $100 million worth of claims that they weren't anticipating that actually came in.

That tells you about the quality of the assumptions that went into the analysis to begin with. They missed it by 50 percent on what the overall claims pool was going to be. That's significant. It's material.

There is a lot of other assumptions that could go into this document, and one of those assumptions are how much are we going to be able to monetize these assets for? One other assumption is, well, how much is it going to cost during the two-year life of this wind-down? Another assumption is going to be, are we actually going to be able to wind down in two years? Because if we're not, well, guess what, all those costs are going to go up. Another assumption is, well, how much are those fee claims going to be over the two-year period? Again, if it goes over two years, they're going to be significantly higher. Moreover, you might have just missed what the burn rate is.

So I think it's rather telling that the assumptions made of -- all the way back of over two -- of only two months ago were off by $100 million, and therefore it skewed all of the plan-versus-liquidation analysis all over the board.

That's the only evidence that the Debtor has put forth as

to why it's in the best interest of the creditors. And quite frankly, we don't believe they have met their burden. And it is their burden to prove to Your Honor that the plan is better than what a Chapter 7 trustee will -- can do.

What the evidence does show, as far as what the plan would do as compared to a hypothetical Chapter 7 trustee, is that we know for sure that the Claimant Trust base fee, just over the two years, is going to be $3.6 million.

(Interruption.)

MR. TAYLOR: I'm sorry.

THE COURT: Someone needs to put their device on mute. I don't know who that was.

MR. TAYLOR: Oh, I'm sorry. I thought you said something, Your Honor.

THE COURT: No.

MR. TAYLOR: So what we do know is the Claimant Trustee base fee is going to be $3.6 million. What we don't know and what was not put into evidence because they are still negotiating it is there's going to be a bonus fee on top of that that's going to be paid to Mr. Seery. Is that $2 million? Is that $4 million? Is that $10 million? Well, we don't know. We can't perform that analysis as compared to what a hypothetical Chapter 7 trustee could be. Nor can Your Honor, based upon the evidence presented.

And quite frankly, I don't see how one could ever conclude

-- and there are some other unknowns that we're about to go over, including the Litigation Trust base fee and there are collection fees, contingency fees. Those are also to be negotiated. To be negotiated and unknown. You can't perform the analysis. The Debtor couldn't perform the analysis because those are to be negotiated, so you can't tell whether a Chapter -- hypothetical Chapter 7 trustee might come out better because he's not going to incur all these costs. We know that they're going to incur D&O costs.

THE COURT: Let me interject right now.

MR. TAYLOR: Sure.

THE COURT: Again, I'm going to go back to understanding who your client is arguing for. Okay? Again, as we've said before, Mr. Pomerantz did not technically say no standing, but he thought it was important to point out the economic interests that our Objectors either have or don't have. Okay?

So I'm looking through my notes to see exactly what the Dondero economic interest is. I have something written in my notes, but I'm going to let you tell me. Tell me what his economic interests are with regard to this Debtor, this reorganization.

MR. TAYLOR: Your Honor, I believe he has been placed into Class 9, Subordinated Claims. So to the extent that there is recovery available to Class 9, he can recover on

those claims.

THE COURT: But what proof of claim --

MR. TAYLOR: We also have --

THE COURT: What proof of claim does he have pending at this juncture?

MR. TAYLOR: Your Honor, I would have to go back and look. I don't have the proofs of claim register in front of me. And I'm sorry, if I tried to speculate, I would be doing a disservice to my client and this Court by trying to speculate. I did not prepare those proofs of claim. People in my firm did. But I would be merely speculating if I tried to give you an answer off the spot. And I apologize. I'm happy to submit a post-confirmation hearing letter --

THE COURT: No, no, no.

MR. TAYLOR: -- as to that.

THE COURT: I'm not going to allow one more piece of paper in connection with confirmation. I thought you would be able to answer that.

MR. TAYLOR: I'm sorry. I just don't want to lie to Your Honor.

THE COURT: What about his -- what would be an indirect equity interest?

MR. TAYLOR: Well, again, there are a lot of people that know this org chart a lot better than me. This is me going on hearsay myself. But I understand he also owns a lot

of indirect interests in subsidiaries, some of which are majority, some of which are minority, and some of which he owns maybe directly, some of which through other entities. So the way in which these assets could be monetized at the sub-debtor level could certainly impact his economic rights and could impact him greatly. For instance, if the --

THE COURT: I really wanted an exact answer.

MR. TAYLOR: Mr. Seery --

THE COURT: I really wanted an exact answer, not just he has an indirect interest in, you know, some of the 2,000 -- I'm not going to say tentacles, but --

I'm going to interrupt briefly, because I really want to nail down the answer as best I can. Mr. Pomerantz, can you just remind me of what your answer was or statement was regarding Mr. Dondero, individually, his economic stake in all this?

MR. POMERANTZ: He has an indemnification claim that's been objected to, --

THE COURT: That's the one and only --

MR. POMERANTZ: -- although it's not before --

THE COURT: That's the one and only pending proof of claim, right?

MR. POMERANTZ: That's my understanding. And while it's not before the Court, we could all imagine whether Mr. Dondero's going to be entitled to indemnification.

He has an interest in Strand, which is the general partner.

THE COURT: Right.

MR. POMERANTZ: And Strand owns a quarter-percent -- a quarter of one percent of the equity. I believe that is all of Mr. Dondero's economic interest in the Debtor.

THE COURT: Okay. So, again, I'm just trying to, you know, understand who he's looking out for, for lack of a better way of saying it, Mr. Taylor, in making these arguments.

MR. TAYLOR: So, there is also, and this is -- I'm not involved in what are these going to be filed collection suits, or some of which have been filed, some of which have not been filed, none of which I believe the answer date has been -- has passed or come to be yet.

But he is also a defendant in collection suits on these notes, as you are undoubtedly aware.

THE COURT: Okay. He's a defendant in adversary proceedings. Okay? That makes him a party in interest to -- well, I keep -- that makes him have standing to make an 1129(a)(7) argument? That's why I'm going down this trail. Because you've spent the last five minutes talking about, you know, creditors could do better in a Chapter 7 liquidation. I'm not sure he has standing to make that argument, so I'm wanting you to address that squarely.

MR. TAYLOR: Your Honor, I believe he has economic interests up and down the capital structure. And I cannot describe to you, without wildly speculating and potentially lying to this Court, which I'm not going to do, without some time to have looked at that, because I was -- I was not involved in the proofs of claim and I am not his accountant. So I could not do that without wildly speculating, so I just -- I would like to more directly answer your question, Your Honor. I am not trying to avoid the question. But I can't honestly answer your question with true facts as we sit here right now.

THE COURT: All right. But do you agree or disagree with me that only parties -- the only parties that really can make an 1129(a)(7) argument are holders of claims or interests in impaired classes?

MR. TAYLOR: Your Honor, I believe that Mr. Dondero has standing to do so by virtue of claims for indemnification --

THE COURT: Okay.

MR. TAYLOR: -- if these -- if these -- if this Debtor (indecipherable) able to meet its obligations to indemnify him. And some of those are significant claims that are being brought against him that could total millions, if not tens of millions of dollars, just in defense costs alone, that I do believe give some standing.

THE COURT: Okay. So, assuming you're right, you think the evidence does not show this is better than a Chapter 7 liquidation where we would have a stranger trustee come in and just, yeah, I guess, cold-turkey liquidate it all.

MR. TAYLOR: Your Honor, I do believe that the evidence shows that the Debtor hasn't met its burden as to this. A Chapter 7 trustee doesn't necessarily have to liquidate immediately. It can run these -- these assets. I mean, Mr. Seery is going to do it with ten people. At one time, just two months ago, he said he was going to do it with three people. A Chapter 7 trustee could certainly have a limited runway, or even an extended runway, if it so asked for it, to liquate these Debtors.

Moreover, there would be at least the requirements that the Chapter 7 trustee would request the sale, tell creditors about it. And, as many courts have said, the competitive bidding process is the best way to make sure that you ensure the highest and best offer that you can get.

Mr. Seery has not committed to providing notice of sales to creditors and other parties in interest, potentially bringing them in as bidders. They -- he could name a stalking horse, but he has not indicated any desire to do so. A Chapter 7 trustee would endeavor to do so.

So I do believe that there are some advantages. And you've heard no testimony that they've performed any analysis

or conducted any interviews with any Chapter 7 trustees as to whether or not this was possible or not. They just made the naked assumption that they would do work based upon what they said was their experience. And Mr. Seery's deposition, when it was taken and noticed as a 30(b)(6) deposition, and I believe it has been entered into evidence here, he said the last time he dealt with a Chapter 7 trustee was 11 or 13 years ago, and it was the *Lehman* case, and that was the -- a SIPC trustee. So --

THE COURT: Well, --

MR. TAYLOR: -- that's the last time he had any experience with it.

THE COURT: -- again, I don't mean to belabor this point, just like I didn't mean to belabor a few others. But, you know, there is a mechanism, yes, in Chapter 7, Section 704, for a trustee to seek court authority to operate a business. But it's not a statute that contemplates long-term operation. Okay? It's just, oh, we've got a little bit of -- you know, we have some assets here that really require a short-term operation here.

If it's long-term, then you convert to Chapter 11. Okay? It's just a temporary tool, Section 704. Right? Would you agree with me?

MR. TAYLOR: That's typically how it has been used.

THE COURT: Okay.

MR. TAYLOR: But that's not to say that it's limited in time by the statute itself. It doesn't say that it can't go for one year or two years. That can be a short wind-down period.

THE COURT: But hasn't your client's argument been this past several weeks that Mr. Seery is moving too fast, he's wanting to sell things and he needs to hold them longer? I mean, these two argument seem inconsistent to me.

MR. TAYLOR: So, just because a Chapter 7 trustee has been appointed doesn't mean that he has to sell them any faster than Mr. Seery.

I think what the -- the problem with the process that has been going on with Mr. Seery, my client's problem with it, is not necessarily the timing but the process that Mr. Seery is going through with these sales. Provide notice, allow more bidders to come in, make sure that he's getting the highest and best price. And if that happens to be Mr. Dondero who offers the highest and best price, great. And if Mr. Dondero gets outbid by somebody, well, that's all the more better for the estate.

THE COURT: Okay. Continue your argument.

MR. TAYLOR: I believe we covered a lot of it, Your Honor, and the plan analysis is all based upon their assumptions that there's $257 million worth of value. Again, there's no rollup provided as to how that asset allocation is

broken out, but they consist of a couple of items.

First, there's the notes; and second, there's the assets. The notes are either long-term or demand notes. Those long-term notes, Mr. Seery will tell you some have been validly accelerated and therefore are now due and payable. I think there's arguments to the contrary. But those long-term notes probably have some both time value of money and collection costs. And then, of course, you have to discount them by collectability issues, too.

I don't believe any analysis went into it, or at least the Court was not provided any data or analysis as to what discounts were applied to those notes. And, therefore, I don't think that this Court can make any determination that the best interests of the creditors have been met.

As far as the assets that are to be monetized, again, there's two sub-buckets of those assets. There's securities that are to be sold. Some of those are semi-public securities that have markets. Those are somewhat more readily ascertained. The others are holdings in private equity companies, and sometimes holdings in companies that own other companies.

There's no evidence of the value -- empirical evidence of the value of those companies, nor of the assumptions that went into as to when they should be sold, how much they'd be sold for.

Again, I do realize the sensitive nature of such information, but that could have been placed under seal. And without that information, I don't believe that the Court can conduct the due diligence it's necessary to say the best interest of the creditors have been met.

To sum up, Your Honor -- oh, I'm sorry. One other point that I did want to talk about before I summed up is, you know, Mr. Pomerantz and I were listening to a different record or I was totally confused as to the testimony that was put forth regarding the directors and officers. I believe the testimony in the record is extremely clear that the Debtor made no effort to go out and find out if it could obtain directors and officers insurance without a gatekeeping injunction or a channeling injunction, whatever you want to call it. I believe that his testimony was extremely clear. He didn't shop it. He doesn't know. And that's what the record is before this Court.

To the extent that the Debtor wants to rely upon we can't get Debtor -- or, directors and officers insurance because without this gatekeeping function we just can't get it, I believe the record just wholly does not support that. The testimony was at least extremely clear, as how I heard it. Your Honor will have to review the record herself, but I don't believe that there was much argument about it.

I'm sure -- as I stated in the beginning, Your Honor, this

is a court of equity. It could deny confirmation, as I believe Your Honor should, based upon the flaws in the plan.

If Your Honor finds that the plan as written is impermissible because of any of the exculpation or the gatekeeping functions that they're asking, the testimony is equally clear that the independent directors would not serve in -- as officers of the Reorganized Debtor. Any plan that is put forth by the Debtor has to tell the people who are going to be officers going forward. And with that naked testimony before the Court, that it's simply not feasible, and I don't think it is one of the possible -- where the Court can come back and say, well, I can't confirm this plan as written, but if you change it and rewrite it to get rid of the certain offensive parts of the exculpation or the gatekeeping functions, then we can confirm this plan. And I think the evidence before this Court is it's not feasible because none of the directors will serve in that capacity, and therefore this plan should be dead on arrival if Your Honor agrees the proposed provisions do not meet *Pacific Lumber*.

We would ask the Court to deny confirmation, but in the alternative, to at least take this under advisement. Give us a time frame -- we'd ask for 30 days -- but give us a time frame of when the Court is going to rule, to allow the positive conversations to move forward.

To that end, Your Honor, there is, indeed, a hearing on

the extension of a temporary injunction and contempt that is scheduled for Friday. I understand that the parties, at least the joint parties, will not -- will agree to, I'm sorry, will agree to the extension of the temporary injunction until such time as the Court can rule on confirmation. I do see that there could be a lot of harm done at the Friday hearing. We would ask that the Court additionally continue that hearing on that motion and on the injunction, and contempt, until such time as confirmation has been ruled upon. It will be both efficient and allow discussions to continue regarding potential global resolution.

And so that is the end of my argument, Your Honor.

THE COURT: All right. Thank you. All right. Mr. Pomerantz, do you have any rebuttal?

REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE DEBTOR

MR. POMERANTZ: Yes, I do, Your Honor. I want to address a couple of comments that Mr. Taylor made towards the end. First of all -- and, actually, the beginning.

We think Your Honor should rule on confirmation. Ruling on confirmation and having an entered confirmation order are two separate things. We understand that a new offer was made. Whether that's acceptable to the Committee -- I actually think it will enhance the ability of the parties to see if they could reach a deal if there's (audio gap) that Your Honor is going to confirm the plan.

Again, doesn't mean a confirmation order has to be entered, but I think, based upon my personal experience in negotiating with Mr. Dondero, that your clear communication to the parties that, unless something happens, you will enter a confirmation order, I think will change things. Okay? Without getting into settlement discussions, things have changed over the last several days, and we wish you would have -- wish things would have happened sooner. But we totally disagree that Your Honor should hold your ruling for 30 days or any other period of time.

Part of the reason I think they are making that argument is because they have an examiner motion and they recognize that, upon confirmation, the examiner motion is moot. So I think there's strategic reasons as well.

We don't think there should be a continuance of the TRO hearing and of the contempt hearing. As Your Honor recalls, the contempt motion was specifically set for this time to give Mr. Dondero enough time to prepare. Your Honor was sensitive to his due process concerns. We set the TRO, the preliminary injunction hearing against the Advisors and the Funds, we set that, again, knowing that it would be after confirmation.

So we do not agree that either should be continued. Again, we think the more direct, unequivocal answers Your Honor can give to the parties, the better off we'll be.

I guess -- Mr. Taylor and I do agree that the record was

clear. I guess we just disagree on the clarity of it. I heard Mr. Tauber testify that when he went out to people, to insurance carriers, after he and Aon were engaged, they all talked about a Dondero exclusion. Okay? They weren't convinced into a gatekeeper provision because it was provided as part of the normal materials you would provide in a bankruptcy court and trying to get D&O liability in the context of a bankruptcy case. Mr. Tauber's testimony was pretty clear, that carriers wanted to have a Dondero exclusion. And, in fact, the only reason we were able to get any coverage was because of the gatekeeper.

So, yes, the record was clear. We just disagree.

I'd like to go back to Mr. Draper's comments going -- and a couple of things, obviously, overlap. I guess one of the things here, it's great that everyone is coming in here as different interests and different parties or whatnot. But as I mentioned, Your Honor, at the outset, and I've repeated a few times, these are all -- the only people we have not been able to resolve issues with are the Dondero parties and the related parties. And I recall the tentacles. Mr. Davor questioned that. Mr. Clemente, his comments. But the fact of the matter is, Your Honor, Your Honor has heard testimony. Your Honor has had hearings. Mr. Rukavina represents the Advisors and the Funds. Your Honor has never seen the independent board member testify in this case to demonstrate

how these entities are really different. So while Mr. Rukavina does -- you know, tries his best, and I think he has limited stuff to work with, but I give him credit for doing the best he can, these are all Dondero-related entities and Your Honor has seen that.

So, Your Honor, going to the resolicitation argument, it actually has taken up a lot more time than the argument is worth, for one very simple reason. As I said in my argument, and as Mr. Taylor and Mr. Draper totally ignored, there were 17 creditors who voted yes, 17 creditors who were apparently misled, that Mr. Draper is looking out for the little guy and Mr. Taylor is fumbling over his reason for why that's important to Dondero. And of those 17 creditors that voted yes, Your Honor, they were either the employees related to HarbourVest, UBS, Redeemer, or Acis, except for two. And you know the other two? One was Contrarian, a claim buyer, who, yeah, elected to be in Class 7, and the other was an employee with a dollar claim.

So the whole argument that there should be a resolicitation is preposterous, Your Honor. But to go to some of the specifics in what they argued, we didn't require creditors to monitor recovery. The footnote -- as I indicated, the UBS 3018 was in the disclosure statement that went out. It didn't make it to the projections. It was clearly -- and they characterize it, I think Mr. Draper

characterized it as buried in the document. There is a section that every disclosure statement is required to have called Risk Factors. This disclosure statement had that. And in the disclosure statement, it talked about the amount of claims being a risk factor.

Mr. Draper also said that the Debtor totally changed its business model from the first to the second analysis. That is incorrect. The Debtor was always going to manage funds. Yes, did they add the CLOs? But before, they were going to manage Multi-Strat, they were going to manage Restoration Capital, they were going to oversee Korea, they were going to be doing the management of the funds. So there wasn't a big change in the business model, Your Honor.

Mr. Taylor, on the solicitation issue, says we found $67 million in assets. You know, that's a disingenuous statement. I think over $20 million was found because his client and related entities didn't make a payment on notes and they got accelerated. So while before we would have had to wait over time if they were paid, it's not surprising that Mr. Dondero and his related entities just failed to basically pay the notes.

So that was, I think, over $20 million. And then there was the HCLOF asset. That was acquired in the HarbourVest settlement. And then there was basically an increase in some value to some assets.

So there wasn't anything mysterious here. There wasn't anything that the Debtor was trying to hide. There weren't any found assets. It was based upon different circumstances.

Mr. Taylor complains about the lack of rollup of assets, the lack of evidence on the best interests of creditors test. Your Honor, you've had extensive testimony from Mr. Seery about what would happen in a Chapter 7 and what would happen in a Chapter 11. And you know why we didn't provide the information to Mr. Taylor and his client on what the rollup of the assets would be, and do you know why he wants them? He wants to know what the assets are so he can try to bid.

And there also was the allegation that the failure to allow them to bid means we're going to get less in a Chapter 11 than a 7. Two comments to that, Your Honor. Number one, if that was the case, a debtor would never be able to satisfy the best interests of creditors test. If the existence of a public process *de facto* meant you would get more value than outside, you would never be able to satisfy that. And, quite honestly, that's just not the law, Your Honor.

You have an Oversight Committee with over $200 million of creditors who are going to watch Mr. Seery like a hawk, like they have watched him during the case. And the concern that somehow, because these assets are not put into full view to sell, that they will get less value, it's just not -- it's not supported by the evidence at all, Your Honor. And Mr. Seery

will make the determination. If it makes sense to notice up and provide Mr. Dondero with notice, he will. If he doesn't, he won't.

Your Honor, going -- oh, and then the last comment on the -- that I'll make on the resolicitation and the liquidation analysis is Mr. Taylor chides us and we've been criticized for not disclosing more about the HarbourVest and the UBS settlements and that we were off substantially. Your Honor, you've heard testimony that we were in pending litigation with HarbourVest and UBS at the time. What kind of litigant would we be if we came in and said, you know, Your Honor, you know, Creditors, we think the UBS claim is going to be allowed at $60 million and we think the HarbourVest claim is going to be allowed at $30 million? Would that really have benefited creditors and this estate, to basically, after we took the position, hard negotiations and hard pleadings that we prepared, and in some cases filed, that we didn't have any liability? It would have made no sense, and it would have been a dereliction of our duty to actually come out and say what the claims -- the claims were, or what we thought they could be settled for.

Your Honor, going back to Mr. Draper's comments. He started with the exculpation. First he made a comment that I don't think he intended what he said, but he said that the exculpation order, the January 9th order, cuts off when the

independent directors go away. I think what he meant to say is that since the three people are not going to be independent directors anymore, that basically any actions going forward by any of those three are not covered. But let's be clear. The January 9th order is in effect, and if at some point in the future somebody has a claim against those three gentleman, or their agents, for what they did as independent directors or their agents, that order will apply.

Your Honor, we next had a discussion, or Mr. Draper and you had a discussion on professionals. I'm aware of the Fifth Circuit law that says res judicata, fee applications. I think that only applies to claims that the Debtor and estate would have. It doesn't really apply to an exculpation. But there's Texas state law that I identified in our brief and we cited to that limits third parties' ability to go after professionals.

But the bottom line is the Fifth Circuit, in *Pacific Lumber*, didn't deal with professionals. Your Honor was correct in pushing both Mr. Taylor and Mr. Rukavina. What really that was was a policy case. And professionals have nothing to do with 524(e). So the *Palco* and the *Pacific Lumber* reference and explanation of 524(e) doesn't have anything to do with professionals. And we would submit, Your Honor, that an exculpation, especially in a case like this, is important for professionals.

I understand Your Honor's comments that maybe it's much

ado about nothing, but I'm not really sure it's much ado about nothing when we have Mr. Dondero and his affiliates who, notwithstanding their efforts to just claim that all they are doing is trying to get a fair shake, Your Honor knows better. Your Honor knows better from the years you've been litigating with them, and we know better and the Debtor knows better from what the independent directors have been dealing with.

THE COURT: Let me ask you this, though. I came into the hearing with the impression we were just talking about postpetition pre-confirmation, or pre-effective date maybe I should say, was the expanse of time covered by exculpation. And Mr. Rukavina said no, no, no, go back, look at, I don't know, Subsection 4 of something. It is a post-confirmation concept. What is your response to that?

MR. POMERANTZ: I believe it's implementation. And, again, --

THE COURT: Implementation? Yes.

MR. POMERANTZ: -- I think Mr. Rukavina -- right. I think Mr. Rukavina and Mr. Taylor and Mr. Draper have done a great job trying to muddy the issues. They talk about our sleight of hand and how we're trying to do things that are way beyond the bankruptcy court's jurisdiction. We are not. I think they are trying -- what they have done throughout the case is throw up enough mud. And here's, here's the answer to that question, Your Honor. Implementation. Okay? We know

what implementation means. The plan says implementation is cancelation of the equity interests, creation of new general partners, restatement of the limited partners, establishment of the Claimant Trust and Litigation Sub-Trust. That's the implementation.

We are not trying to get exculpation for post-confirmation activity. Actually, my partner, Mr. Kharasch, in specifically addressing Mr. Rukavina's concern, said, look, if you have a problem with cause, if you have a problem, want to exercise your rights, we're only asking you to come back to the Court. We are not stopping you.

So the whole argument that the exculpation is really broad and is not really -- does not really cover just the plan, the approved plan, I think is a red herring. Implementation is implementation in the context of the plan.

And also Mr. Rukavina tries to argue that, well, it's administration, it's not really you acting any operation of business. I just don't think there's any support in the case law. Your Honor has overseen this case, overseen this Debtor's activities, overseen the independent directors' activities, overseen Strand's activities, overseen the employees' activities. And those activities have been (indecipherable) administration of the case. And his attempt to create a different category for, well, it's not administration, it's operation and so it doesn't apply, I just

think is wrong.

Your Honor made a couple of comments about what was *Pacific Lumber* doing. It was a policy decision. If there was a bright-line rule, then nobody would be entitled to exculpation. The very fact that the Fifth Circuit said that Committee members are different made -- makes it clear it was -- it was policy.

And Mr. Taylor's comments that, well, their creation of statute, Chapter 11 trustees and Committee members, that's not what basically the case said. If you look at the citation to touters in the case, it was we want people to volunteer and who are needed for the process. Committee members are needed for the process. We don't want to discourage them from coming in. And the only testimony you have on the independent directors is from Mr. Dubel, and he testified the importance of independent directors to modern-day Chapter 11 practice, the importance of exculpation, indemnification, and D&O insurance. And his testimony: uncontroverted. The Objectors could have brought in someone to say something different, but the only testimony before Your Honor is, if Your Honor does not approve exculpations in cases like this, you will not get independent directors and it will have an adverse effect on the Chapter 11 process.

So, while I appreciate all the Objectors trying to say bright line, trying to say *Pacific Lumber*, that is the gut

reaction, right? That's -- it's easy to say. But Your Honor will know better, from reading the cases, that's not what *Pacific Lumber* says. And for the several reasons I gave, it's the reason why *Pacific Lumber* does not govern the decision in this case.

Your Honor, Mr. Draper then started to talk about *Craig*. And everyone cites *Craig* as this, you know, limiting jurisdiction. Now, we acknowledge that *Craig* and the Fifth Circuit has a more limited post-confirmation jurisdiction approach than the other Circuits, but it's not nonexistent. And just because the Debtor is going out post-confirmation and acting does not mean that the conduct that they are engaging in is not -- and disputes that arise, doesn't come within the Court's jurisdiction. If that was the case, and I think Your Honor recognized this, in your case it was the *TXMS* case, while it's limited, more limited after confirmation, and I think you even, in the case -- or, in one case of yours, said that even after the case is closed there could be jurisdiction. So their just trying to argue *Craig* is just -- is just too much.

Going out of the gatekeeper, Mr. Draper tried to say we are *Barton*, and that's it, and *Barton* has its limitations, et cetera. First of all, with respect to *Barton*, it is not limited and doesn't include debtors-in-possession. We have cited cases in our materials where it has been applied to

debtors-in-possession.

So, you know, look, maybe this is a provision -- this is a proposition like many in bankruptcy, you could find a bankruptcy court to agree with a proposition, but there's cases all over the place on that. There's cases applying to post-confirmation. The trend has been to expand *Barton*. But the beauty of it is, Your Honor, you don't have to rely on *Barton*. *Barton* was one of our arguments. We gave *Barton* as, you know, somewhat of an analogy but somehow applying because in the -- because the independent directors were like the trustees.

But we recognize it may be going farther than *Barton* has previously gone. But the case law is clear, it is being extended. But we -- I gave you several provisions of the Bankruptcy Code that authorized you to enter a gatekeeper order. None of the Objectors objected on any of those grounds. They didn't say the statutes that I cited. And it wasn't only 105, I know bankruptcy practitioners love to cite 105, but there were three or four others that I mentioned, and they're in our brief. There's no case that they cited that said that there is no authority on the gatekeeper.

But what was the argument that was raised? And I think Mr. Rukavina raised it, saying, you know, look, I don't understand the argument of no jurisdiction, of jurisdiction for a gatekeeper but no jurisdiction for underlying cause of

action. Well, Mr. Rukavina should read and Your Honor should read, when you're considering the plan, the case, the *Villegas* case in the Fifth Circuit as it dealt with *Stern*. That was particularly a case. Does *Barton* -- is *Barton* impacted from *Stern*? By *Stern*? And *Stern*, we know, limits the bankruptcy court's jurisdiction. But, no, the Fifth Circuit said, in that case, no. Even though the bankruptcy court's jurisdiction is limited to hear the claim, there is nothing inconsistent with that and allowing the bankruptcy court to act as a gatekeeper.

So Mr. Rukavina's argument that, well, he'll present to you that there's cause and you'll find there's no cause and then he will be without a remedy by someone that had jurisdiction, that really sounds good but it just doesn't withstand analytic scrutiny. There is a distinction. They are glossing over the distinction. They don't like the distinction.

And why is that distinction -- and why is it important in this case? Again, we're not talking about garden-variety people who are just involved with a debtor and will get caught up in a bankruptcy. We narrowly tailored the gatekeeper to enjoined parties. Enjoined parties are the people before Your Honor, some of the people that have made the Debtor's life miserable over the last few months.

We have every interest and desire, as does the Committee,

to go out post-confirmation and monetize these assets. But we see the clouds on the horizon. We see all the pleadings that have been filed by the Objectors saying how, if there's no deal, there will be an unending amount of costs and appeals. It's, you know, the point, not too subtle. It wasn't lost on us.

Your Honor, going to Mr. Rukavina's arguments on Class 8 cram down, again, it's really a hard argument to understand, but first I want to make a point. He sort of mentioned -- and I'm not sure if he intends to preserve this on appeal, but it was not objected to and I'll ask for a ruling on it, Your Honor -- he said that there was inappropriate separate classification. That was not raised in any of the objections. We don't think it was properly before the Court. We understand there's a component of that in unfair discrimination in connection with a cram down, but there is no objection, there was no filed objection, to the separate classification of the deficiency claims and the Class 8 unsecured claims.

And if you look at the voting, you realize it wasn't done for gerrymandering, because if you put both claims together, both classes together, you would have had one class that voted yes.

So I don't believe the separate classification under the 1129 standards is appropriate for Your Honor to consider,

other than in connection with the cram down.

Now, Mr. Rukavina complains that the only way the convenience class was decided was by way of negotiation. Your Honor, how else do provisions like that get decided? And who was the negotiation between? It was between the Committee. And one of the benefits of a Committee process, and I represent a lot of Committees, you put people in a Committee that have diverse interests and they can come up with an appropriate result. And here you have that. You had one creditor who was a convenience creditor. You have three other creditors who would lose liquidity if convenience payments are made.

Do you think that UBS, Acis and Redeemer, do you think they had a desire just to pay people off? No. It was part of a collaborative process. So to say that there was no basis and no testimony on the appropriateness to have -- and how the convenience class was put together just would be wrong.

And with respect to the absolute priority rule, Your Honor, again, there's a missing link here, okay? These are contingent interests. They are property. No doubt they are property. But if I did not allow those creditors or those equity to have a contingent interest, the argument would have been made that the plan violates the absolute priority rule. And I said that in my argument. And why would it have violated the absolute priority rule? Because there's a

potential that creditors could get over a hundred cents on the dollar, plus interest. So it's a game of gotcha, right?

And why do they really care? Mr. Dugaboy said in his -- Mr. Draper said in his brief that Dugaboy cares because they may have wanted to buy the interest. Well, I'm sure they can go to Hunter Mountain, you know, Mr. Dondero's left hand can go to his right hand, and I'm sure he'd be happy to sell the contingent interests.

And with respect to the argument that Mr. Rukavina made about control, equity be in control, yeah, control is a right. No doubt. You've got -- if you're giving control to the post-confirmation Debtor, that could be a right and implicate the absolute priority rule. But what is the control here? Equity is not given any rights. Your Honor heard how the post-confirmation entity is structured. It's going to be Mr. Seery, overseen by an Oversight Board. So I really don't understand the concept of control. There just is no violation of the absolute priority rule.

Your Honor, Mr. Rukavina then took us to task for 2000 -- or, for not filing the 2015.3 statement. And if you take his argument to the logical conclusion -- well, we didn't file it, we didn't comply with that Rule, so we're not in compliance with the Bankruptcy Code, so we can never basically get our plan confirmed, right, because it's a violation and we didn't file and seek an extension.

That's just a preposterous argument, Your Honor. Mr. Seery poignantly told the Court, in the rush of things that were going on, it wasn't filed. Did Mr. Rukavina, before yesterday, having Mr. Dubel on the stand, did he ever ask where is our 2015.3 report? He probably didn't ask it because the answer -- when I told him the reason why it wasn't filed before January 9 was because I don't think Mr. Dondero wanted it filed, and I think that's why, as Mr. Seery testified, we were having a challenging time getting that information from the in-house -- in-house.

But, yes, should it have been filed? Yes. But if that is all they could point to through the course of the case that Mr. Seery or Mr. -- or the rest of the board did wrong, you know, I think that just demonstrates they did a fine job.

THE COURT: All right.

MR. POMERANTZ: Your Honor?

THE COURT: You've got four minutes left.

MR. POMERANTZ: Oh. Okay. Your Honor, going to Mr. Rukavina and the Strand argument that it's a nondebtor entity, as I explained in my argument, the Strand -- Strand needs to get exculpation or else that's a backdoor way to the Debtor. Forget about the independent directors, it's a backdoor way to the Debtor. Because Mr. Dondero will be in control. If Strand is sued for post-January 9th activities, he will assert an administrative claim. And one thing from *Pacific Lumber* is

clear, the Debtor is entitled to an exculpation as part of the injunction and the -- and the discharge.

Your Honor, Mr. Kharasch adequately addressed Mr. Rukavina's comments with the gatekeeper and the gatekeeper problem. We are not seeking to stop his clients, however related they may be, from exercising their rights. We are seeking a process that will not embroil the Debtor in litigation going forward. There is no problem with Your Honor acting as the gatekeeper to do so. And to the extent that they are bound by the January 9th order is not really an issue for today. That'll be an issue at the temporary -- the temporary -- at the preliminary injunction hearing.

I -- just one minute, Your Honor.

(Pause.)

MR. POMERANTZ: Your Honor, I think I covered a lot. If there's anything that any of the Objectors have mentioned that I failed to respond to, I'd be happy to answer questions Your Honor has.

THE COURT: All right. I guess there's, what, about two minutes left, if Mr. Clemente had anything.

Mr. Clemente, have you drifted off? I doubt it. But anything else from you, Mr. Clemente?

MR. TAYLOR: Your Honor, I show him talking -- this is Clay Taylor -- but no one's hearing him.

THE COURT: Okay. Mr. Clemente, we are not hearing

you, or I'm not seeing you. Make sure you're not on mute.

THE CLERK: He's not on mute, Judge.

THE COURT: He's not on mute? So we must have a bandwidth issue or something else.

All right. Mr. Clemente, still not hearing or seeing you. We'll give him another 30 seconds.

THE CLERK: He's coming up.

THE COURT: He's coming up? Ah, I see his name now.

MR. CLEMENTE: Your Honor, can you hear me?

THE COURT: I can hear you now.

MR. CLEMENTE: Okay, Your Honor. I don't know what happened. I just switched another camera, so you may not be able to see me, but can you hear me? I'll be very quick.

THE COURT: Okay. I can hear you.

MR. CLEMENTE: Can you hear me?

THE COURT: Yes.

MR. CLEMENTE: Okay. Thank you, Your Honor.

CLOSING ARGUMENT ON BEHALF OF THE UNSECURED CREDITORS' COMMITTEE

MR. CLEMENTE: Two things I want to say. First, just on Class 8, I think what's important, as my comments emphasized earlier, the structure of Class 8. We must remember what it is. It's really designed so that Class 8 holders receive their pro rata share of what's left after prior claims are paid. That's really what Class 8 creditors voted on. That's what the disclosure provided. They did not

vote on receiving a specific dollar or a specific recovery percentage.

And regarding the projections and estimates, Your Honor, we're talking about large litigation claims that were asserted and then settled. And given the nature of these assets, the values fluctuate. It's perfectly expected, Your Honor, and indeed disclosed, that there could be wide swings in the amount of claims. That does not lead to the conclusion that the plan needs to be resolicited.

And then, finally, Your Honor, again, Mr. Pomerantz adequately addressed all the points, as he did with his earlier presentation, so I'm not going to touch on them, but I did want to respond to one thing that Mr. Taylor said. And I, of course, agree with Mr. Pomerantz. The Committee believes there's no reason for you to delay a ruling and would in fact urge you to rule as soon as Your Honor is ready to rule. Confirmation of the plan, to the extent that there are conversations occurring, is not going to prevent those conversations from taking place, and they can continue after the plan is confirmed. There's simply nothing inherent in Your Honor confirming the plan that would prevent those conversations from occurring or would ultimately prevent parties from pivoting to a deal on the off-chance that one should be reached.

So I just wanted to emphasize, Your Honor, again, Your

Honor is going to rule when Your Honor rules, but the Committee would urge you to rule, and certainly the idea that there may or may not be discussions with Mr. Dondero should not at all in any way lead you to the conclusion that you shouldn't rule or that those conversations cannot continue after plan confirmation.

Thank you, Your Honor. Unless you have questions for me. And my apologies with the technology.

THE COURT: No problem. All right. Here's what I'm going to do. We can see you now, Mr. Clemente.

MR. CLEMENTE: Oh. I'm sorry, Your Honor. I switched to another camera again because it wasn't working. So, I apologize.

THE COURT: All right. I am going to call you back Monday. What day of the week will that be? Is that -- I mean, Monday, what date, I should say. That'll be the 8th, right? I am going to call you back Monday, this coming Monday, February 8th, at 9:30 Central time, and I am going to give you my ruling. It will be a detailed oral bench ruling. And I'm not going to leave you hanging on the edge of your seat over the next few days. I will tell you I'm inclined to confirm this plan. I think it meets all of the requirements of 1129 and 1123 and 1122.

The thing that I am going to spend some time thinking about between now and Monday morning is, no surprise, the

propriety of the exculpations, the propriety of the plan injunctions, the propriety of the gatekeeper provisions. I certainly am duty-bound to go back and reread *Pacific Lumber*, to go back and read *Thru, Inc.*, and to really think hard about what is happening here.

So, I'm pretty much down, I think, to just those three issues here. I'll talk to my law clerk. He may remind me of something else that I'm not articulating right now. But I think I'm just down to those issues. Okay? So it's not going to be a mystery very long. We will come back Monday, 9:30. My courtroom deputy will post on the docket the WebEx connection instructions as usual, and we'll go from there. Now, --

MR. POMERANTZ: Your Honor? Your Honor, this is Jeff Pomerantz. I have a question, and it's going to sound odd coming from someone on the West Coast, but I was wondering if you could do it earlier. And the only reason I say that is, the night before, I have to call in to see if I'm on jury duty on Monday, and it would be helpful to me -- I assume your reading the ruling would be within a half hour, 45 minutes. That if you started at 9:00, if that was possible, I could then get in a car, and if I'm actually called to jury duty, I can get there. Of course, I don't know if I will be called, but I'd hate to miss it.

THE COURT: Okay. Well, I don't want to make you

miss jury duty. Okay. We will do 9:00 o'clock.

MR. POMERANTZ: Thank you, Your Honor.

THE COURT: Hopefully no one will be, you know, hung over from watching the Super Bowl. Personally, I don't like Tom Brady, so I may be boycotting the Super Bowl. But maybe I'll watch it. Maybe I'll -- I'll watch it. So we'll do it 9:00 o'clock. So 9:00 o'clock next Monday.

Now, let's talk about next the currently-set hearing this Friday, February 5th, on the injunction and contempt of court motion as to Mr. Dondero and the other entities. I want to continue that, and here is what I am struggling with. The only day I have next week is Friday, the 12th, and I would rather not use that date because I'm pretty jam-packed Monday through Thursday, unless stuff has been settled that I haven't become aware of. So let me ask two things. First, when is the examiner motion set? I'm just wondering if there's a block of time we have coming up that --

MR. POMERANTZ: I believe that's March 2nd, Your Honor, so that's not for another month.

THE COURT: Oh, that's not for another month? All right.

Traci, are you on the line? I want to ask you --

THE CLERK: Yes, I am.

THE COURT: What about the following week? I know Monday, the 15th, is a federal holiday, but do we have

availability for -- I fear a full day is going to be needed for continuing this Friday setting.

THE CLERK: Wednesday, February 17th, is available.

THE COURT: We've got all day on Wednesday, February 17th?

THE CLERK: Yes.

THE COURT: All right. What about that? I think I heard Mr. Rukavina, I think he's the one who threw it out there -- or maybe it was Mr. Taylor; I'm getting mixed up -- the possibility that they would agree to a continuation of the preliminary injunction through -- well, I think you said through confirmation. Until the Court enters a confirmation order. And if I were to rule and approve confirmation Monday, then we're talking about an order that might be entered sooner than the 17th. So, do you all have any --

MR. RUKAVINA: Your Honor?

THE COURT: -- mutually-agreeable suggestions? If not, I'm just going to set it the 12th and I'll, you know, I'm killing myself, but I'll --

MR. TAYLOR: Your Honor?

MR. RUKAVINA: No, Your Honor. I think Your Honor is wise to do what's she's proposing. The agreed TRO against my clients expires on the 15th of February.

THE COURT: Uh-huh.

MR. RUKAVINA: We can easily move that back a week or

a sufficient amount of time so that there's no prejudice by going on the 17th, if that would be acceptable to the Debtor, and then we can just pick a date that's sufficiently after the PI hearing so that there's protection for everyone.

THE COURT: All right. Mr. Taylor, do you agree?

MR. TAYLOR: Yes, Your Honor. That is acceptable to Mr. Dondero.

THE COURT: Okay.

MR. TAYLOR: We can also push it back. Can you hear me?

THE COURT: Yes, I can. Uh-huh.

MR. TAYLOR: Okay.

THE COURT: All right.

MR. POMERANTZ: I just want to make -- I just want to make sure Mr. Morris, John Morris, is on, since he's taking the lead in those matters. I don't see his picture.

MR. MORRIS: I am, Jeff, and I appreciate that. I'm available, Your Honor. We were supposed to take the depositions of Mr. Leventon and Mr. Ellington tomorrow. I don't know if their counsel is on the phone. But given Your Honor's decision to adjourn the hearing from Friday, I would respectfully request at this time that counsel for those two individuals work with me to find a date next week in order to take those depositions.

THE COURT: All right. That's --

MS. DANDENEAU: Debra Dandeneau from --

THE COURT: Go ahead.

MS. DANDENEAU: This is Debra Dandeneau from Baker McKenzie. We agree, and we're happy to work with you on a rescheduled time.

MR. MORRIS: Thank you very much.

THE COURT: All right. All right. So, someone had filed a motion to continue Friday's hearing. I think it was your firm, Mr. Taylor. I already had a motion pending for a few days now. So I'm going to direct you to upload an order, Mr. Taylor, or someone at your firm, continuing the hearing to the 17th at 9:30, with language in there that your -- the injunction is continuing at least through that date. And, again, it's a continuance of the motion for contempt as well as the setting on the preliminary injunction. And, of course, run that by Mr. Morris and Mr. Rukavina.

MR. TAYLOR: Sure. Your Honor, this is -- I'm not handling the injunction hearing, or at least I don't think I am. But just so that I'm clear, should maybe the injunction continue through the next day or something, so depending on how Your Honor rules, there's not a rush to try and get an order to you?

MR. RUKAVINA: Your Honor, I think that Mr. Morris and I can work this out. Mr. Taylor is not involved in that adversary, that's true, but Mr. Morris and I will be able to

very quickly enter a proposed agreed order that extends that TRO for some period of time.

THE COURT: Okay.

MR. RUKAVINA: I'm not going to be difficult.

THE COURT: Okay. So we'll shift to you and Mr. Morris to be the scriveners. I just -- I suggested that because I thought there was a motion to link the order to that had been filed by Bonds Ellis. I may be --

MR. MORRIS: There was, Your Honor. There was an emergency motion to continue. We filed an opposition, and Your Honor has not yet ruled on that motion. You're exactly right.

THE COURT: Okay. All right.

MR. TAYLOR: Your Honor, this is Clay Taylor. I will make sure the right people confer with Davor and John, and we'll get -- we'll link it to that motion, because that makes sense, to have something to link it to.

THE COURT: Okay. Yes. And it can be a two-paragraph order, I would think.

All right. And then so I'm going to see you Monday at 9:00 o'clock Central time with the ruling.

Please, don't anyone file anymore paper. I threw that out earlier today. I've got all the paper I need. And I will see you Monday at 9:00 o'clock. Okay? We're adjourned.

MR. POMERANTZ: Thank you, Your Honor.

THE CLERK: All rise.

MR. MORRIS: Thank you, Your Honor.

(Proceedings concluded at 4:34 p.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Kathy Rehling **02/05/2021**

_____ _____

Kathy Rehling, CETD-444 Date

Certified Electronic Court Transcriber

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